Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1995

ELIOT R. FREEMAN,
PETITIONER,

v.

TOWN OF WEST BOYLSTON, CHARLES GREENOUGH, AND KATHLEEN FOREMAN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

HAROLD HESTNES
Counsel of Record
THOMAS N. O'CONNOR
JANE CETLIN PICKRELL
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 526-6000
Counsel for Petitioner

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

QUESTIONS PRESENTED

1. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts improperly announced and applied a novel "truly horrendous" standard for substantive due process claims under 42 U.S.C. 1983, which standard is more onerous than and contrary to, any standard for substantive due process claims under §1983 previously announced or applied by any federal court.

2. Whether this Court should resolve the conflict between (a) the "arbitrary and capricious" standard for substantive due process claims under 42 U.S.C. §1983 applied by the majority of the federal courts and (b) the First Circuit Court of Appeals' "shocking the conscience" standard for such claims because: (i) the two standards are materially different, thereby relegating the validity and enforceability of substantive due process rights dependent on the forum available rather than on the United States Constitution and (ii) a uniform standard applied in all courts of the United States, state and federal, will ensure that rights conferred by the United States Constitution and protected by federal statute are secured to citizens of all states, wherever located, and not on the fortuity of the available venue.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

Eliot R. Freeman (the "petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered February 24, 1995.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (App., *infra*, A-2-21) is reported at 419 Mass. 548 (1995).

JURISDICTION

On February 24, 1995, the Supreme Judicial Court of the Commonwealth of Massachusetts reversed the judgments of the Superior Court of Worcester County entered on September 18, 1992 upon special verdicts of the jury. On May 19, 1995, this Court granted an extension of time for filing a petition for a writ of certiorari until July 24, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part:

"Nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

U.S. Const., Amend. XIV, §1.

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. §1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

42 U.S.C. §1983 (1994).

Mass. Gen. L. ch. 41, §81M provides in pertinent part: "It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land."

Mass. Gen. L. ch. 41, §81M (1994).

STATEMENT OF THE CASE

This case presents for consideration whether this Court should announce a uniform federal standard to resolve substantive due process claims brought under 42 U.S.C. §1983, particularly in the context of land use regulation. The Federal Circuit Courts of Appeal now apply different standards, thereby producing different results in substantially similar cases and rendering a plaintiff's substantive due process rights dependent on the forum, rather than on the United States Constitution. The lack of a uniform standard enabled the Massachusetts Supreme Judicial Court in this case to announce and impose a nebulous and ill-defined "truly horrendous" test which was more onerous and stringent than any federal standard.

A majority of the federal courts apply an "arbitrary and capricious" standard to evaluate substantive due process claims under 42 U.S.C. §1983 arising from the deprivation of the use or development of one's property. The First Circuit Court of Appeals, however, has adopted a standard that expressly rejects the arbitrary and capricious test and instead requires proof that the challenged conduct was "egregious" or "stunning" or "shocking to the conscience." In overturning the jury's verdicts in this case, which had found that the challenged conduct of the West Boylston Planning Board and two of its members was shocking to the jury's conscience or legally irrational, the Massachusetts Supreme Judicial Court went even further than the standard adopted by the First Circuit Court of Appeals and applied a "truly horrendous" standard for federal substantive due process violations brought under 42 U.S.C. §1983. The conflict among the Federal Circuit Courts of Appeal and the lack of a uniform federal standard to be applied in these types of cases caused the Massachu-

setts Supreme Judicial Court to err in adopting a standard clearly more onerous than the "arbitrary and capricious" standard applied by the majority of federal courts.

The petitioner respectfully urges this Court to accept this case for review to: (1) confirm that the highest state court of the Commonwealth of Massachusetts is compelled to follow federal law in resolving claims arising under 42 U.S.C. §1983 rather than announcing and adopting its own novel standard; and (2) announce a uniform federal standard for reviewing claims under 42 U.S.C. §1983 based on violations of substantive due process.

A. *Factual Background*

The petitioner is the owner and developer of a parcel of land in West Boylston, Massachusetts. On August 26, 1985, the petitioner submitted a definitive subdivision plan to the Planning Board of the Town of West Boylston, Massachusetts (the "Planning Board") to build a fifteen lot residential subdivision. Under the terms of the Massachusetts subdivision control statute, Mass. Gen. L. ch. 41, §81K, *et seq.*, a municipal planning board must approve any plan that complies with that board's written regulations; the planning board has no discretionary authority. Mass. Gen. L. ch. 41, §81M.

On October 24, 1985, the Planning Board denied approval of the petitioner's plan citing three grounds: (1) inadequate drainage; (2) inadequate sight distance;[1] and (3) lack of board of health approvals. It is undisputed that the first two grounds exceeded the regulations of the Planning Board.[2]

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[1] Sight distance refers to a driver's line of vision at the intersection of two roadways.

[2] The Planning Board required the petitioner to insure that the storm drain system for the proposed subdivision accommodate the peak rate of runoff associated with a 100 year storm instead of a 25 year storm, as required by the board's regulations. The Planning Board also increased the sight distance requirement from 275 feet, as published, to 325 feet, based upon siting a stop sign some forty feet back from the intersection.

B. *Proceedings Below*

The petitioner appealed the Planning Board's decision to the Massachusetts Superior Court pursuant to Mass. Gen. L. ch. 41, §81BB. On October 17, 1986, after trial, the court annulled the Planning Board's decision on the grounds that it exceeded the board's authority. Having found that the petitioner complied with the applicable sight distance and intersection safety regulations, the court remanded the case to the Planning Board for reconsideration on the sole issue of whether the petitioner complied with the storm drainage criterion set forth in the regulations. (App., *infra*, A-44-55).[3]

Thereafter, for nearly two years, the petitioner pursued approval of his plan from the Planning Board, but the Planning Board continued to condition approval on petitioner's compliance with criteria which the Superior Court had explicitly held were inapplicable and which exceeded the board's authority. During this time, the petitioner returned to the Superior Court on no fewer than three occasions — in October, 1987, March, 1988 and August, 1988 — seeking orders compelling the Board to take action on his proposal consistent with the court's October, 1986 order.

In October, 1987, the Superior Court expressly ordered the Board to limit its review of the petitioner's plan to the drainage question and to render a decision on that issue only, no later than November 17, 1987. (App., *infra*, A-41-43). In violation of that order, the Board did not issue a decision limited to the drainage question. Instead, the Board submitted a proposal to the court conditioning approval of the plan on the petitioner's compliance with two new requirements, including demonstration of the safety of the proposed intersection and construction of a through street in the subdivision. At that time, the Board knew it had no authority to impose

[3] The Superior Court also found that board of health approval was required, but the petitioner obtained those approvals shortly after remand, thereby mooting that issue. Lack of board of health approval was not at issue in the case tried under 42 U.S.C. §1983.

these conditions of approval because the prior orders of the Superior Court specifically held that the Board was without authority to do so and was required to limit its decision to the drainage issue only.[4]

The petitioner again returned to court objecting to the Board's imposition of these additional conditions. On March 18, 1988, the court acknowledged that the Board was required to hold a public hearing on the plan. (App., *infra*, A-38-40). Following a public hearing on June 20, 1988, the Planning Board again voted to condition approval of the plan on the petitioner submitting documentation substantiating the safety of the intersection — the very same issue which the Superior Court almost two years earlier and after a full trial had held the Board was without authority to regulate. Thereafter, the petitioner returned to court and, on August 24, 1988, the Massachusetts Superior Court entered final judgment in his favor, declaring that the Board's imposition of conditions regarding the intersection were contrary to the court's prior orders and beyond the Board's authority and hence were invalid. (App. *infra*, A-34-37).

By the time the petitioner finally was able to proceed with his development, almost four years after he had originally submitted his proposal and two and a half years after the Superior Court first held that the intersection satisfied the Board's regulations, the market had declined precipitously.[5] Consequently, the petitioner filed this lawsuit against the Town of West Boylston, its Planning Board, individual members of the

[4] Indeed, at trial, two members of the Planning Board, who were named defendants, and the Board's review engineer, against whom the case was earlier dismissed, admitted that although all of the issues raised by the court's October 1986 and 1987 orders were resolved by November 1987, the Board deliberately and intentionally violated those orders and continued to impose conditions to approval that they knew the Board had no authority to impose. *See* Transcript, 743-45 (testimony of Charles Greenough); 533-38 (testimony of Kathleen Foreman); 352-55, 372 (testimony of Michael Rafferty). The evidence at trial also demonstrated that the Board flagrantly disregarded the advice of its own counsel as to its obligations under the court's orders. *See* Transcript, 160 (testimony of James Burgoyne).

[5] By the time this case was tried in September 1992, only two of the fifteen lots in the subdivision had been sold.

board, and the board's review engineer (collectively, the "Town of West Boylston") on December 20, 1988 in Worcester County Superior Court. In Count I of the Complaint, the petitioner alleged that the Town's denial of approval of his subdivision plan, in blatant violation of the Superior Court's various orders and his compliance with all applicable regulations, deprived him of substantive due process rights under the Fourteenth Amendment to the United States Constitution and thereby stated a cause of action under 42 U.S.C. §1983.[6]

At the conclusion of the trial, the Superior Court instructed the jury on the petitioner's §1983 claim that: "What is required in order to violate due process by infringing or injuring property is the use of . . . governmental power for purposes of oppression or the abuse of government power that shocks the conscience or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest. . . ."[7] By special verdicts, the jury found for the petitioner on this, as well as all other, counts. (App., *infra*, A-28-33). The Worcester County Superior Court denied the Town's motion for judgment notwithstanding the verdict and entered judgments for the petitioner on September 18, 1992. (App., *infra*, A-22-27).

The Town of West Boylston appealed the judgments to the Massachusetts Appeals Court, from which the Massachusetts Supreme Judicial Court transferred the case *sua sponte*. The Supreme Judicial Court overturned the jury's verdicts and reversed the judgments of the Superior Court on all counts. Acknowledging that the "standards for finding a violation of substantive due process rights are not precise . . ." (App., *infra*, A-14), the Massachusetts Supreme Judicial Court then concluded that the jury's verdicts finding violations under 42 U.S.C. §1983 and the judgments rendered on those verdicts should be reversed because "this case does not present one of

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[6] The action against the engineer was dismissed voluntarily prior to trial.

[7] This standard, arguably, exceeded the test adopted by the First Circuit Court of Appeals.

the 'truly horrendous' situations in which relief is available by means of a claim under §1983." (App., *infra*, A-15).

REASONS FOR GRANTING THE PETITION

I. The Massachusetts Supreme Judicial Court Improperly Announced And Applied A Novel "Truly Horrendous" Standard For Substantive Due Process Claims Under 42 U.S.C. §1983 Which Is More Onerous Than And Contrary To Any Standard Previously Announced Or Applied By Any Federal Court.

The Massachusetts Supreme Judicial Court disregarded the federal law it was compelled to apply to the petitioner's §1983 claim. Instead, the court created a novel "truly horrendous" standard for evaluating claims of substantive due process violations brought under 42 U.S.C. §1983. This standard is not grounded in the law pronounced by any of the federal courts which have resolved §1983 claims and is more onerous than even the most burdensome standard applied by the First Circuit Court of Appeals in the land use regulation context.

As a threshold matter, because the Supreme Judicial Court created a state standard rather than applying a federal standard to resolve a question of federal law, its decision must be set aside and the jury verdicts reinstated. *See Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) (state court must apply the elements of and defenses to a federal cause of action which are defined by federal law). More particularly, the Massachusetts high court, after acknowledging the strict standard imposed by the First Circuit Court of Appeals for establishing substantive due process violations,[8] disregarded that standard

[8] The Supreme Judicial Court specifically recognized that, "decisions of the First Circuit have made clear what is required [in order to find a violation of substantive due process rights] is misconduct that is 'stunning, evidencing more than humdrum legal error.' . . . It is not enough to show that the board 'exceeded, abused or distorted its legal authority,' . . . or that it committed an outright violation of state law. . . ." (App., *infra*, A-14) (citations omitted).

and instead opined that "this case does not present one of the truly horrendous situations in which relief is available by means of a claim under §1983." (App., *infra*, A-15). Not only is this "truly horrendous" standard a novel and impermissibly vague test, it is not predicated on any decision of the First Circuit or any other federal court.[9]

In addition to the Massachusetts Supreme Judicial Court's "truly horrendous" standard failing to comply with federal law, it is a higher and more onerous standard than even that applied by the First Circuit Court of Appeals. On instructions utilizing the First Circuit's "shocking the conscience" standard, the jury expressly found that the misconduct of the Planning Board and two of its members was sufficiently egregious to violate the petitioner's substantive due process rights protected by the United States Constitution. Whether state action constitutes a violation of substantive due process is an issue of fact for the jury to decide based upon the evidence presented. *See Blanche Road Corp. v. Bensalem Township*, Nos. 94-1344, 1362, 1995 WL 317667, at *13 (3d Cir. May 26, 1995). In overturning the jury's factual finding that the Planning Board's misconduct satisfied the First Circuit's test for substantive due process violations, the Massachusetts Supreme Judicial Court elevated the standard beyond that imposed by the First Circuit and effectively eliminated any possibility that misconduct by local planning boards, however egregious or shocking to the jury's conscience, could ever constitute a violation of substantive due process. In essence, the

[9] In *Nestor Colon Medina & Sucesores, Inc.* v. *Custodio*, 964 F.2d 32, 45 (1st Cir. 1992), the First Circuit noted its rulings that the due process clause may not be invoked to resolve local planning disputes. Stating that, "this Circuit's precedent makes clear that the threshold for establishing the requisite 'abuse of government power' is a high one indeed," it went on to state that it would leave "the door slightly ajar for federal relief in truly horrendous situations." The First Circuit's use of the term "horrendous" indicated the specific type of conduct which would violate the "egregious misconduct" standard. It did not hold that "horrendous" conduct was interchangeable with "egregious misconduct" or that conduct need be horrendous to comport with that standard, only that horrendous conduct would certainly meet the First Circuit's high standard.

Massachusetts Supreme Judicial Court's "truly horrendous" standard permits and authorizes local planning boards to act with impunity even when their egregious misconduct tramples substantive due process rights secured by the United States Constitution.

Because the standard adopted by the Massachusetts Supreme Judicial Court to resolve a question of federal law is in direct conflict with the law of the various federal courts on this precise issue, the Court should grant this petition for a writ of certiorari. *See, e.g., Nichols* v. *United States*, 114 S. Ct. 1921, 1925 (1994) (certiorari granted to resolve conflict among state courts as well as Federal Courts of Appeal); *Lakeside* v. *Oregon*, 435 U.S. 333, 336 (1978) (certiorari granted where decisions of highest state courts conflicts with decisions of federal courts of appeal).

II. This Court Should Resolve The Conflict Between The "Arbitrary And Capricious" Standard Applied By The Majority Of The Federal Courts And The First Circuit Court of Appeals' "Shocking The Conscience" Standard And Impose A Uniform Rule To Be Applied In Cases Involving Violations Of Substantive Due Process Rights Brought Under 42 U.S.C. §1983

As the Third Circuit Court of Appeals recently proclaimed, "Substantive due process is an area of the law 'famous for its controversy, and not known for its simplicity' ... [The court's] due process inquiry is rendered even more difficult by the paucity of Supreme Court guidance." *DeBlasio* v. *Zoning Bd. of Adjustment for the Tp. of W. Amwell*, 53 F.3d 592, 598 (3d Cir. 1995)(citation omitted). The lack of uniformity among the circuits in the context of land use regulation implicating substantive due process rights is "remarkable." *Pearson* v. *City of Grand Blanc*, 961 F.2d. 1211, 1217 (6th Cir. 1992) (canvassing the circuit courts' various treatment of substantive due process claims in zoning cases).

The following survey of federal decisions indicates the Circuit Courts are in clear conflict, inviting the Court to grant

this petition in order to resolve a compelling constitutional issue. *See Marks* v. *United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits.") *See, e.g., RRI Realty Corp.* v. *Village of Southampton*, 870 F.2d 911, 918 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) (adopting entitlement approach to zoning cases; appropriate inquiry is whether questioned permit or right had level of "certainty or a very strong likelihood of issuance"); *DeBlasio*, 53 F.3d at 601 (in the context of land use regulation, "a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrary or irrationally reached."); *Scott* v. *Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) (applying abuse of discretion or caprice standard); *Shelton* v. *City of College Station*, 780 F.2d 475, 480 (5th Cir.), *cert. denied*, 477 U.S. 905; 479 U.S. 822 (1986) (applying legislative standard — whether the ordinance or action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" — to review local zoning statutes and specific actions); *Pearson*, 961 F.2d at 1221 (applying "shock the conscience" test; zoning ordinance need only bear a rational relationship to legitimate land use concern); *Coniston Corp.* v. *Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (zoning decision denies substantive due process "only if it is irrational"); *Chesterfield Dev. Corp.* v. *City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) (theory of substantive due process is properly reserved for truly egregious and extraordinary cases); *Dodd* v. *Hood River City*, No. 93-35207, 1995 U.S. App. Lexis 15977 at *30 (9th Cir. June 29, 1995) (arbitrary and capricious actions are those which are "'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'") (citation omitted); *Jacobs, Visconi & Jacobs* v. *City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991) (arbitrary and capricious standard applies to zoning-related substantive due process claims); *Edie* v. *Sarasota County*, 908 F.2d 716, 721-22 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) (same); *Silverman* v. *Barry*, 845 F.2d

1072, 1080 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988) (to succeed on substantive due process claim, plaintiffs must show local officials "are guilty of grave unfairness in the discharge of their legal responsibilities"; noting that "a deliberate flouting of the law that trammels significant personal or property rights," qualifies for §1983 relief).

With the exception of the First Circuit, the federal courts of appeal essentially but variously apply an "arbitrary and capricious" or "irrational" standard in their review of §1983 claims. *See Littlefield* v. *City of Afton*, 785 F.2d 596, 604 (8th Cir. 1986) (noting that a number of circuits, with the exception of the First, recognize that an arbitrary, capricious or illegal denial of a building permit states a substantive due process claim under §1983). The First Circuit, however, applies a much more stringent standard. *See, e.g., Nestor Colon Medina & Sucesores, Inc.* v. *Custodio*, 964 F.2d 32, 45-47 (1st Cir. 1992) (denial of land use permit in retaliation for political expression did not rise to the level of substantive due process violation); *PFZ Properties, Inc.* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1994) (authority's failure to comply with regulations not sufficient to support substantive due process claim); *Amsden* v. *Moran*, 904 F.2d 748, 757-58 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991) (no substantive due process violation where revocation of permit was improperly motivated); *Chiplin Enters., Inc.* v. *City of Lebanon*, 712 F.2d 1524, 1526-28 (1st Cir. 1983) (bad faith refusal to follow state law not sufficient to state substantive due process claim); *Creative Env'ts, Inc.* v. *Estabrook*, 680 F.2d 822, 831-34 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982) (town's distortion of regulatory scheme in rejection of developer's plan not a denial of substantive due process). *But see Roy* v. *City of Augusta*, 712 F.2d 1517, 1523-24 (1st Cir. 1983) (subversion of state licensing process stated substantive due process claim sufficient to survive motion for summary judgment)

These cases demonstrate that under the present state of the

law, a plaintiff's right to redress for abridgement of substantive due process rights in land use regulation cases depends largely on the fortuity of where the alleged violation occurred. Rights protected by the due process clause of the United States Constitution and by 42 U.S.C. §1983 should be recognized and enforced uniformly nationwide, not on an ad hoc, state by state or circuit by circuit basis.

Because §1983 is the exclusive remedy where due process violations by state government are alleged, *see Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 734-35 (1989); *Williams* v. *Bennett*, 689 F.2d 1370, 1390 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) (remedy under §1983 against state officials precludes direct action under Fourteenth Amendment); *Wynn* v. *Morgan*, 861 F.Supp. 622, 630 (E.D. Tenn. 1994) (§1983 is exclusive remedy for alleged constitutional violations), there is a compelling need for a uniform standard. To permit otherwise would, and indeed has, produced the untenable situation whereby plaintiffs having substantially similar due process claims are treated differently merely because of the particular venue where the action must be brought. Absent a uniform rule, a developer's right to require local planning boards to conduct themselves within the bounds of substantive due process limitations will be dependent upon which state, or which federal circuit, the land is located. *Accord Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816) (recognizing the imperative for uniformity of decisions by United States tribunals "upon all subjects within the purview of the constitution [because] judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself.").

Announcement of a uniform standard by this Court to be applied in all courts of the United States, state and federal, will ensure that rights conferred by the United States Constitution and protected by federal statute are secured to citizens of all states, wherever located, and not on the fortuity of the available venue to bring a claim for substantive due process violations under 42 U.S.C. §1983.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD HESTNES
Counsel of Record
THOMAS N. O'CONNOR
JANE CETLIN PICKRELL
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 526-6000
Counsel for Petitioner

Dated: July 24, 1995

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, February 24, 1995

IN THE CASE NO. SJC-06645
ELIOT R. FREEMAN
v.
PLANNING BOARD OF WEST BOYLSTON & OTHERS

pending in the Superior Court Department of the Trial Court for the County of Worcester No. 88-3632

ORDERED, that the following entry be made in the docket; viz.,--

Judgments are reversed. Judgments are to enter for the defendants.

BY THE COURT,
s/JEAN M. KENNETT, CLERK.

February 24, 1995

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICAL COURT

SJC-06645

ELIOT R. FREEMAN
vs.
PLANNING BOARD OF WEST BOYLSTON & OTHERS.[1]

Worcester. November 9, 1994. - February 24, 1995.

Present: LIACOS, C.J., ABRAMS, NOLAN, O'CONNOR, & GREANEY, JJ.

Subdivision Control, Decision of planning board, Streets, Plan, Drainage. *Due Process of Law*, Substantive rights. *Civil Rights*, Availability of remedy, Coercion.

Civil action commenced in the Superior Court Department on December 20, 1988.

The case was tried before CHARLES F. BARRETT, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Elizabeth A. Lane & Joyce Frank for the defendants.

Thomas N. O'Connor (B.J. Krintzman with him) for the plaintiff.

GREANEY, J. The plaintiff, Eliot R. Freeman, brought an action in the Superior Court against the town of West Boylston (town), acting through its planning board (board), and certain members of the planning board individually.[2] The

[1] Charles Greenough and Kathleen Foreman, as members of the planning board of West Boylston, and individually.

[2] In addition to Charles Greenough and Kathleen Foreman, the complaint also named as defendants four other individuals who had been members of the board, sued in their personal capacity, two other board members sued only in their official capacity, and Michael Rafferty, in his capacity as the consulting civil engineer for the board. The case went to the jury against the town acting through its planning board and four members of the board who were sued individually. The jury returned verdicts in favor of two of the individual defendants.

plaintiff's action sought damages on the basis of claims that the defendants, in connection with the plaintiff's efforts to obtain approval of a definitive subdivision plan pursuant to G. L. c. 41, §§ 81K et seq. (1992 ed.), deprived him of his substantive due process rights under the Fourteenth Amendment to the United States Constitution, and violated the Massachusetts Civil Rights Act, G. L. c. 12, § 11I (1992 ed.). A jury in the Superior Court returned special verdicts finding the town liable on both the Federal and State claims, and they assessed identical damages of $375,000 on each claim. The jury also found the defendants Charles Greenough and Kathleen Foreman individually liable on the same claims, and they assessed damages of $50 on each claim against each of them. Judgments were entered, and, subsequently, the plaintiff's application for attorney's fees and costs was allowed in the amount of $120,000 in attorney's fees and $3,333.75 in costs and expert witness fees.[3] The defendants appealed, and we transferred the case to this court on our own motion. We conclude that the plaintiff's evidence was not sufficient, as matter of law, to warrant the jury's verdicts, and, as a consequence, the defendants' motions for judgment notwithstanding the verdict should have been allowed. Consequently, we reverse the judgments, and we order entry of judgments for the defendants on all claims.

1. We begin by examining the evidence in some detail. We do not consider its weight. Rather, the determination focuses on "whether, 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.' " *Raunela* v. *Hertz Corp.*, 361 Mass. 341, 343 (1972), quoting *Kelly* v. *Railway Express Agency, Inc.*, 315 Mass. 301, 302 (1943). Viewing the evidence from this perspective, the jury could have found the following facts.

[3] By amended judgments, each of the defendants was made liable, jointly and severally, for the award of attorney's fees, costs, and expert witness fees.

In 1982, the plaintiff purchased a seventy-six acre parcel of land in the town and he obtained the board's approval for a subdivision of twenty-six acres of the property into six residential lots, all of which were sold between 1984 and 1985. On August 26, 1985, he applied for approval of a definitive subdivision plan, pursuant to G. L. c. 41, §§ 81K et seq., for the remaining fifty acres of the property. The plan proposed a residential subdivision to be called "Lost Oak Road," on land between Prospect and Goodale Streets in the town. The plan showed two new subdivision roads, both ending in culs-de-sac. One of these, called Lost Oak Road, served thirteen lots, and intersected with Prospect Street. The other, called Acorn Path, served two lots and intersected with Goodale Street.

The board referred the plan for review to Michael Rafferty, its consulting civil engineer. In accord with the statutory requirement, see G. L. c. 41, § 81T (1992 ed.), a public hearing was held on September 30, 1985. In connection with the hearing, Rafferty issued a report on the plaintiff's plan, in which he concluded that the plan satisfied the board's regulation regarding sight distances at the intersection of Lost Oak Road and Prospect Street,[4] but that the storm water run-off from the developed site would exceed the run-off from the site in its undeveloped state for both twenty-five and one-hundred year storm events.[5]

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[4] The term "'sight distance" refers to a driver's line of vision at the intersection of two roadways. When the plaintiff submitted the definitive subdivision plan for Lost Oak Road, the board's regulations required sight distance of a minimum of 275 feet in either direction at the intersection of an existing and a proposed roadway.

The sight distance requirement applied to Lost Oak Road and to Acorn Path, but only the intersection of Lost Oak Road and Prospect Street caused controversy between the plaintiff and the board.

[5] The board's regulations required a storm drain system for each street in a new subdivision. The system was to be designed "so that the . . . rate of discharge at points where runoff collected by the street drainage system leaves the subdivision shall not exceed the peak rate of discharge from the site as it presently exists in its undeveloped state. The criteria to be used to establish the peak rate of discharge from the site as it presently exists is that peak rate of runoff associated with a 25 year storm."

At the public hearing, board member Kathleen Foreman, a defendant, voiced concern about the safety of the intersection of Prospect Street and Lost Oak Road (intersection). As a result, the board directed Rafferty to reevaluate the proposed intersection. In a letter dated October 12, 1985, Rafferty informed the board members that, "to provide for safe vehicular operation at this intersection," sight distance should be measured from a point approximately fifty feet back from the westerly edge of Prospect Street.[6] At this point, the proposed roadway dipped below the existing grade, "creat[ing] a 'blind spot' within the sight line in both directions." In Rafferty's view, the steep grade of Prospect Street was an additional concern which warranted increasing the sight distance requirement from 275 feet to 325 feet. The plan would require modification, he informed the board, to meet the design criteria outlined in this letter.

On October 24, 1985, the board issued a certificate of planning board action (October, 1985, certificate) disapproving the plaintiff's plan on the grounds that (1) the proposed drainage system was not adequate to guarantee a zero increase in run-off associated with a twenty-five or a one-hundred year storm event[7]; (2) the sight distances were inadequate at the intersection of Lost Oak Road and Prospect Street to assure safe vehicular traffic[8]; and (3) approval of the development by the town's board of health had not been obtained.[9] In connection

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[6] This point corresponded to the position of a driver at a stop sign which Rafferty calculated would be placed some forty feet from the westerly edge of Prospect Street. The driver would be required to stop ten feet behind the stop sign.

[7] The board's regulations only addressed run-off associated with a twenty-five year storm event. See note 5, *supra*. The board included calculations associated with the one-hundred year storm event because that was the criterion used by the town's conservation commission in evaluating submissions under the Wetlands Protection Act.

[8] This determination was based on the information provided in Rafferty's letter of October 12, 1985.

[9] In November, 1986, the plaintiff obtained approval of his plan from the board of health, and this ceased to be an issue in the case.

with point (2), the board required the plaintiff to obtain "[s]lope and sight distance easements" across land belonging to the Wachusett Country Club. There was evidence that the plaintiff could not obtain these easements, and that, at some point, he so informed the board.

The board's regulations also required that proposed streets conform to the town's master plan as adopted by the board. That plan called for a through street running between Prospect and Goodale Streets in the general area of the plaintiff's property. The plaintiff had requested a waiver of this requirement. In the October, 1985, certificate, the board "[d]efer[red] action on the request to eliminate a through street from Prospect Street to Goodale Street until such time that the safety of the proposed intersection with Prospect Street is resolved to the satisfaction of [the] board."

The plaintiff appealed from the board's decision to the Superior Court. See G. L. c. 41, § 81BB (1992 ed.). On October 9, 1986, after a trial, a judge in the Superior Court entered findings of fact, conclusions of law, and an order for judgment (October, 1986, order). Judgment entered in accord with the order on October 17, 1986. Although the judge concluded that the board could not impose conditions based on a one-hundred year storm, she affirmed the board's disapproval of the proposed drainage system for failure to provide adequately for drainage measured by the twenty-five year storm standard. She noted that the applicable regulations only required sight distance of 275 feet in either direction, a requirement obviously satisfied by the definitive plan. Thus, she annulled, as exceeding the board's authority, that portion of the October, 1985, certificate which stated that the plan failed to provide adequate sight distance at the intersection of Lost Oak Road and Prospect Street. The case was remanded to the board for further action consistent with the October, 1986, order.

In January, 1987, after discussions with counsel for the town, the plaintiff's attorney attended a regularly scheduled

meeting of the board. At this meeting, the board indicated that it intended to consult with town counsel and Rafferty with respect to the import of the October, 1986, order, and that it was considering whether to appeal from the decision of the Superior Court.

By letter dated February 11, 1987, counsel for the town informed the board that, in his opinion, "the Court ha[d] found that the Board exceeded its authority [with respect to the sight distance issue]," and that, unless the board decided to appeal, "there [was] nothing left for the Board to do on this issue." He nonetheless indicated that "it would seem appropriate . . . to have the Board discuss with the Developer the construction details at the intersection of Prospect Street so as to increase the sight distances delineated on the original plan."[10] Town counsel also opined that the board's responsibility was to receive either new data or amendments (or both) to the proposed drainage system, and suggested that a public hearing would not be required if amendments to the plan were confined to the drainage system. In a subsequent letter, dated April 17, 1987, town counsel informed the board that the October, 1986, order was interlocutory and therefore not immediately appealable, and advised that, in any event, the board would be unlikely to prevail on appeal with respect to the issue of intersection design. He reiterated his opinion that a public hearing would not be required (although one could be held) to consider revisions to the drainage system. As of February, 1987, the defendant Foreman, at least, understood that the October, 1986, order "was limited to the issue of drainage," and that the judge had ruled that the board did not have the authority to impose any additional requirements related to the design or safety of the intersection.

On or about March 21, 1987, Rafferty responded to the

[10] That attorney testified that he had indicated to town counsel that the plaintiff remained willing to discuss with the board the issue of sight distance at the intersection, although, as the plaintiff has satisfied the regulations, he was confident he had no obligation to alter the design of the intersection.

board's inquiry with a draft of a revised certificate of planning board action, affirming the board's dispproval of the plaintiff's definitive plan. The cover letter indicated that the draft incorporated changes "in response to the Court's findings." This draft disapproved the definitive plan due to deficiencies in the drainage, based on criteria associated with a twenty-five year storm. In addition, the draft questioned "the safety of the proposed intersection," reiterated the concerns previously expressed, and required the plaintiff to "submit recognized and accepted technical documentation substantiating the safety and adequacy of the intersection design for both vehicular and pedestrian traffic." Rafferty stated, in a letter accompanying the draft, that the October, 1986, order "did not relieve the applicant's engineer from his professional obligation to use reasonable design standards in the design of this intersection, and to convince [the board] that he had done so." Authority for requiring substantiation of the intersection's safety was derived from the stated purposes of the subdivision control law, see G. L. c. 41, § 81M (1992 ed.), which include providing access to subdivision lots "by ways that will be safe and convenient for travel . . . lessening congestion in such ways . . . [and] reducing danger to life and limb in the operation of motor vehicles." Rafferty's letter also suggested, in so many words, that the through street requirement could be used as a bargaining chip by the board to exact concessions from the plaintiff with respect to the design on the intersection.

On March 30, 1987, the plaintiff's attorney submitted a letter to the board, containing revised drainage calculations, and he requested approval of the definitive plan. Several days later, he attended a regularly scheduled board meeting, and attempted to submit a revised plan page to reflect a change (addition of "detention basin") in the proposed drainage system. Although the board declined to accept the page as a formal submission, Rafferty was asked to review the revised drainage calculations. By a letter dated May 2, 1987, he

advised the board that the revisions to the drainage plans did not meet the standards mandated by the court.

In early May, 1987, the plaintiff's attorney again attended a meeting of the board, where he was informed that Rafferty had concluded that the revised drainage plans were not in compliance with the board's regulations. He was also informed that the question of the plaintiff's request for a waiver of the through street requirement, on which the board had previously deferred action, would have to be addressed, and that an amended plan would require an additional public hearing.

The plaintiff expressed his disagreement with the board's position as to the permissible scope of its review of the plan in a motion submitted to the judge, dated July 8, 1987, in which it was contended that the board "ha[d] failed to accept submissions offered by the plaintiff, ha[d] failed to take further action as required by the Court's order for judgment, and ha[d] taken further action inconsistent with the Court's rulings and its own regulations."

The judge held a hearing on the motion on August 5, 1987, at which she orally ordered the board to take the action required by the October, 1986, order no later than August 25, 1987 (modified by agreement of the parties to September 14, 1987). On September 20, the board informed the plaintiff that it had voted to require a through street in the subdivision.[11] In response, by an order dated October 15, 1987 (October, 1987, order) the judge ordered the board to review immediately the plaintiff's plans and calculations relating to drainage, and to limit its review of the plan to the issue of drainage. The board's review was to be completed and issued in written form no later than November 17, 1987.

On that date, the board submitted to the judge a proposal in letter form indicating that the board had voted to modify its disapproval of the plaintiff's plan to an approval, subject

[11] The defendant Foreman testified that she had consistently opposed imposition of a through street requirement, and had voted against it.

to certain conditions, including a requirement that the plaintiff provide documentation substantiating the safety of the intersection. The letter also indicated that the board intended to deny the plaintiff's request for a waiver of the through street requirement. On the ground that it was required by statute to do so, the board proposed holding a public hearing prior to approval of the revised definitive plan.

The plaintiff returned to court, objecting to the proposed imposition of the intersection safety documentation and the through street requirements contained in the letter proposal, and requesting that the judge order the board to approve his definitive plan without a public hearing and without regard to the conditions. By a memorandum and order dated March 18, 1988, the judge agreed with the board that a public hearing was required, and deferred consideration whether the other conditions proposed by the board could be imposed until after the hearing, which was held on May 9, 1988.

On June 24, 1988, following the public hearing, which was attended by a number of abuttors, the board issued a certificate of planning board action (June, 1988, certificate) approving the plaintiff's definitive plan for the Lost Oak subdivision, subect to certain conditions, among them a requirement that the plaintiff "submit recognized and accepted technical documentation substantiating the safety and adequacy of the intersection design for both vehicular and pedestrian traffic." The certificate allowed the request for a waiver from the through street requirement.[12] The plaintiff returned to court. On August 24, 1988, final judgment entered for the plaintiff. The accompanying memorandum and order declared invalid, and contrary to the court's prior orders, the part of the June, 1988, certificate which required the plaintiff to submit documentation substantiating the safety of the intersection. This suit followed.

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[12] At the public hearing, a number of abuttors had objected to imposition of the through street requirement.

An abuttor's appeal from the board's approval of the plan, dismissed by agreement on March 21, 1989, caused additional delay in the development of the plaintiff's property. There was evidence that the market for real estate in the town was very active through June, 1988, but that the market had declined considerably by April, 1989. At the time of trial, in September, 1992, only two lots in the subdivlsion had been sold.

The jury heard that a local planning board must approve any subdivision plan that complies with the applicable regulations. See G. L. c. § 41, 81M. Based on the evidence, the jury could have found that the board attempted to impose conditions on its approval of the plaintiff's definitive subdivision plan with respect to the design of the intersection, which it knew were invalid, beyond the scope of its power, and contrary to repeated orders issued by a judge in the Superior Court. They also could have found that the board was unnecessarily dilatory in its consideratlon of the plaintiff's definitive plan, and that it improperly attempted to exact concessions from the plaintiff with respect to the design of the intersection. As the trial judge observed, however, there was no evidence of personal animus against the plaintiff or of any motive on the board's part other than concern about the safety of the intersection.

2. We first consider the validity of the plaintiff's Federal claims, brought under 42 U.S.C. § 1983 (1988). In this respect, the plaintiff claims that the board and its members violated his right to due process by withholding approval of his definitive plan despite its compliance wlth the applicable rules and regulations. We are not concerned with a claim that the plaintiff was deprived of property without appropriate procedural protections. Rather, the claim is that the board's misuse of the administrative process was so arbitrary and capricious that a violation of the plaintiff's substantive due process rights resulted. See *Amsden* v. *Moran*, 904 F.2d 748, 753-754 (1st Cir.1990), cert. denied, 498 U.S. 1041 (1991) (discussing the distinction between procedural and substantive due process claims).

The jury were instructed that, as matter of law, actions taken by the board were "under color of state law," 42 U.S.C. § 1983, and that the plaintiff had a property right in approval of a subdivision plan that conformed to the board's rules and regulations. Additional instructions were framed on the basis of the decision in *PFZ Properties Inc.* v. *Rodriguez*, 928 F.2d 28 (1st Cir. 1991), cert. dismissed, 503 U.S. 257 (1992). The jury were told that:

> "[The doctrine of substantive due process] doesn't protect individuals from all governmental actions that infringe or injure some property right in violation of some law . . . .
>
> "What is required in order to violate due process by infringing or injuring property is the use of . . . governmental power for purposes of oppression or the abuse of government power that shocks the conscience or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest. . . .
>
> "Now, mere error on the part of a government official alone that may cause someone's property rights to be injured is not enough. Merely being wrong is not enough. Neither is merely . . . acting in excess of authority granted to a government agency or body, such as a Planning Board, enough. Neither is being merely . . . arbitrary in doing or undertaking the duties of a Planning Board enough. Neither is mere bad faith alone necessarily tantamount or equal to a violation of the plaintiff's due process rights.
>
> "Not every violation by a government body of someone's property rights rises to the level of a violation of due process. It must be of such a nature as I mentioned to you a moment ago. Namely, it's government power being used for purposes of oppression, abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate interest of the Town of West Boylston."

Neither party obected to these instructions, which, therefore, became the law of the case. See *Barry* v. *Stop & Shop Cos.*, 24 Mass.App. Ct. 224, 230 (1987).[13] Thus, we consider whether, viewing the evidence in the light most favorable to the plaintiff, there was a sufficient basis to demonstrate, on the part of the board and its individual members, the "requisite arbitrariness and caprice," *Amsden* v. *Moran*, *supra* at 754 n.5, to constitute a violation of the plaintiff's Federal constitutional rights. In so doing, we assume that the plaintiff had a property right in approval of the definitive plan. See *id.* at 754. See also *PFZ Properties, Inc.* v. *Rodriguez*, *supra* at 31.[14]

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[13] In *Littlefield* v. *Afton*, 785 F.2d 596 (8th Cir. 1986), the United States Court of Appeals for the Eighth Circuit noted that most of the Federal Circuit Courts of Appeals which had considered the question had concluded that, without more, "an arbitrary, capricious or illegal denial of a building permit states a substantive due process claim under § 1983. *Id.* at 604. In contrast, the United States Court of Appeals for the First Circuit, has consistently required egregious misconduct of a more serious nature before recognizing a substantive due process violation based on the action of a local governmental authority such as a planning board. See *id.* See also M. Bobrowski, Massachusetts Land Use and Planning Law § 2.6.1, at 76-78 (1993).

Because the parties chose to rely on cases from the First Circuit in framing their requests for jury instructions and other contentions to the judge, we need not (and do not) consider which of these approaches is correct as a matter of Federal constitutional law. Rather, we apply the law as it has been articulated by the First Circuit in a series of cases involving disputes between developers and local planning boards or similar local governmental bodies. See *PFZ Properties, Inc.* v. *Rodriguez*, 928 F.2d 28 (1st Cir. 1991), cert. dismissed, 503 U.S. 257 (1992); *Chiplin Enters., Inc.* v. *Lebanon*, 712 F.2d 1524 (1st Cir. 1983); *Roy* v. *Augusta*, 712 F.2d 1517 (1st Cir. 1983); *Creative Env'ts, Inc.* v. *Estabrook*, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S.989 (1982). See also *Amsden* v. *Moran*, 904 F.2d 748 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991) (concerning State board's revocation of land surveyor's license).

[14] On appeal, the defendants argue that the plaintiff had no legitimate entitlement to approval of his plan prior to April, 1989, and thus no constitutionally protected property interest prior to that date. In summary, it is argued that the judge's remand order was a nullity because a judge is required to uphold a planning board disapproval which is valid on at least one ground. Once the plan was disapproved, the plaintiff was obligated to resubmit a new plan in compliance with all regulations in effect on the

The standards for finding a violation of substantive due process rights are not precise, see *Johnson* v. *Glick*, 481 F.2d 1028, 1033 & n.6 (2d Cir.), cert. denied sub nom. *Employee Officer John* v. *Johnson*, 414 U.S. 1033 (1973), but decisions of the First Circuit have made clear that what is required is misconduct that is "stunning, evidencing more than humdrum legal error." *Amsden* v. *Moran*, *supra*. It is not enough to show that the board "exceeded, abused or 'distorted' its legal authority," *Creative Env'ts, Inc.* v. *Estabrook*, 680 F.2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989 (1982), or that it committed an outright violation of State law. See *Chiplin Enters., Inc.* v. *Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983). Even "a . . . bad faith refusal to follow state law in such local administrative matters . . . does not amount to a deprivation of due process where the state courts are available to correct error." *PFZ Properties, Inc.* v. *Rodriguez*, *supra* at 32, quoting *Chiplin Enters., Inc.* v. *Lebanon*, *supra* at 1528.

Most recently, the First Circuit has observed:

> "Clearly, it is no simple matter to decide what abuses to regard as abuses of 'substantive' due process. Every litigant is likely to regard his own case as involving such an injustice. Thus, we have consistently held that the due process clause may not ordinarily be used [in cases involving] the rights and wrongs of local planning disputes. . . . We have left the door slightly ajar for federal relief in truly horrendous situations. But this circuit's precedent makes clear that the threshold for establishing the requisite 'abuse of government power' is a high one indeed."

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date of application (the board's rules and regulations were amended in 1986), obtain board of health approval of the new plan, and submit to an additional public hearing. As the plaintiff did not take these steps, it is argued, he had no property right in approval of his plan. We do not consider whether this contention is correct, because, in its present, highly detailed guise, it does not resemble any argument made to the judge below. See *Franklin* v. *Spadafora*, 388 Mass. 764, 771 (1983). Thus, we agree with the plaintiff's contention that the defendants' motions for directed verdict and for judgment n.o.v. failed to preserve this issue, in this form, for appeal.

Nestor Colon Medina & Sucesores, Inc. v. *Custodio*, 964 F.2d 32, 45 (1st Cir. 1992).[15]

We have no hesitation in concluding that this case does not present one of the "truly horrendous" situations in which relief is available by means of a claim under § 1983. Relying on *Roy* v. *Augusta*, 712 F.2d 1517 (1st Cir. 1983), the plaintiff focuses in particular on the board's failure to comply with the various orders issued by the Superior Court judge. The behavior of the board, however, falls far short of the behavior attributed to the city council in the *Roy* case. In that case, it was alleged, the city council deliberately and knowingly flouted the mandate of the State courts, "and that because of special circumstances the state courts were now unavailable to correct the wrong." *Chiplin Enters., Inc.* v. *Lebanon*, *supra* at 1528.

Here, it is much less clear that the board deliberately flouted the judge's authority. The October, 1986, order remanded the case to the board for action consistent with the judge's written decision. Nowhere in that decision was it stated that the board's sole remaining responsibility was to accept and consider additional material from the plaintiff concerning drainage. Also, nowhere in that decision was it suggested that the board had forfeited the right to insist on compliance with the through street requirement. The board's failure to do at this point what the plaintiff contends it was required to do was neither irrational nor obviously at odds

[15] Relylng on *Resolution Trust Corp.* v. *Town of Highlands Beach*, 18 F.3d 1536, 1549, rehearing granted and opinion vacated, 42 F.3d 626 (11th Cir. 1994), the plaintiff argues that "[w]hether the challenged conduct is of such a nature as to constitute a violation of substantive due process is an issue of fact for the jury." This is true only if the evidence of misconduct, if believed, is sufficient to meet the demanding standard for liability set out in the cases decided by the First Circuit, on which the parties have relied.

In this regard, we note that the relevant First Circuit cases, on which the parties relied at trial, were resolved on motions to dismiss or for summary judgment. With one exception, all were resolved in favor of the defendants, with the judge, having recited the evidence in the light most favorable to the plaintiff, concluding that, as matter of law, no violation of substantive due process rights had occurred.

with the judge's order. In fact, as subsequent events estabished, the October, 1986, order did not instruct the board that its sole remaining responsibility vis-a-vis the plaintiff's plan was to consider data related to drainage, since the judge subsequently agreed with the board that it was also required to hold an additional public hearing on amendments to the plaintiff's plan. Moreover, the board had received conflicting advice in regard to the October, 1986, order. While indicating that the board had done all it could do with regard to the design of the intersection, town counsel also indicated that the topic remained open for discussion with the plaintiff. The board's consulting engineer forcefully contended, after the order issued, that the board retained the authority to insist on improvements to the intersection.

It was not until October, 1987, that the judge issued written instructions to the board to confine itself to reviewing the plaintiff's plans and calculations relating to drainage. In November, 1987, when the board improperly attempted to require the plaintiff to furnish documentation verifying the safety of the intersection, it did so in the form of a proposal for approval of the plan and subect to the judge's approval. As was previously noted, as late as March, 1988, the judge agreed with the board's position to the extent of ordering a new public hearing, and declined to instruct the board that it must confine itself to considering the drainage issue.

Most importantly, unlike the case in *Roy*, the plaintiff "prevailed in the state courts, and as a result, now has [his planning board approval]." *Chiplin Enters., Inc.* v. *Lebanon*, *supra*. Here, the board attempted to impose conditions on approval of the plan in excess of its authority, thereby contributing to delay in approval of the plan, but it did not attempt to deny the plaintiff the approval to which, at some point, he was entitled, and did not cause him the loss of his property. See *id.* at 1528 n.7 (plaintiffs allegation that defendants "acted contemptuously of the highest court in the state" immaterial when delay ended with grant of permit). Cf. *Roy* v. *Augusta*, *supra* at 1523-1524. Delay far in excess of that

proved in this case has been rejected as a basis for finding a violation of substantive due process rights. See *PFZ Properties, Inc.* v. *Rodriguez*, *supra* at 32 (delay exceeding four years; no approval ever obtained); *Chiplin Enters., Inc.* v. *Lebanon*, *supra* at 1526 (five-year delay before approval).

Because a local planning board is required to approve a subdivision plan that complies with local rules and regulations, the plaintiff also argues that the board's action was legally irrational in that it was not keyed to any legitimate state interest. Although the board's attempt to impose conditions beyond the scope of its authority was improper, its members were motivated by doubts about the safety of the intersection, a legitimate area of concern for a local planning board. See G. L. c. 41 § 81M. As has been previously noted, there was no evidence of personal animus, that other developers were treated more favorably than the plaintiff, or that board members stood to profit personally from their actions. The board members' conduct was not exemplary.[16] Nonetheless, viewed in the light most favorable to the plaintiff, the evidence does not establish the "truly horrendous" situation in which a violation of substantive due process rights may be found to exist. The defendants' motions for directed verdict and for judgment n.o.v. on the plaintiff's Federal claims should have been granted.

3. The plaintiff's claim under the Massachusetts Civil Rights Act, G. L. c. 12, § 11I (Act), stands on a different footing. To establish a claim under the Act, a plaintiff "must

[16] As has been described, some of the difficulties incurred by the plaintiff are attributable to delay in the Superior Court's disposition of motions and other pleadings by the plaintiff seeking a judicial order directing the board to approve his plan. The denial of a claim under 42 U.S.C. § 1983 (1988), depends on the availability of an efficient State remedy. In the future the Superior Court should be attentive in a case like this to efforts by a developer to obtain relief. Applications for enforcement should be acted on as promptly as possible, and precise directions should be furnished to the board so that it knows exactly what it can and cannot do. If definite orders are entered, a developer will have a basis to seek a contempt judgment if a board fails to comply with an unequivocal judicial directive.

prove that (1) his exercise of enjoyment of rights secured by the Constitution or the laws of either the United States or the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.'" *Bally* v. *Northeastern Univ.*, 403 Mass. 713, 717 (1989).

The plaintiff's State civil rights claim was premised on a violation by the defendants of G. L. c. 41, § 81M, the provisions of which constitute a law "of the commonwealth." The jury were instructed that the board was required to approve a definitive plan complying with its current rules and regulations. They heard evidence from which they could have concluded that the board delayed approval of the plaintiff's plan once it was in compliance with the applicable regulations. They had before them the final Superior Court judgment of August, 24, 1988 (as to which the board chose not to pursue its appeal), stating that "the Planning Board of the Town of West Boylston exceeded its authority in disapproving the definitive plan as it relates to the proposed intersection." From this evidence, the jury could find that the defendants' conduct was in violation of G. L. c. 41, § 81M. See note 14, *supra*. Compare *K. Hovnanian at Taunton, Inc.* v. *Taunton*, 37 Mass. App. Ct. 639, 646-647 & n.12 (1994) (no statutory right to tie in to sewer line, and, consequently, no interference with constitutionally protected property rights and no violation of the Act). With respect to the first and second of the requirements set out above, there was an adequate basis for the jury's verdict on the State civil rights claim, distinct from the alleged violation of the plaintiff's Federal substantive due process rights. We turn, therefore, to the question whether the board's actions were "coercive" within the meaning of the Act (there being no evidence of threats or intimidation). See *Pheasant*

Ridge Assocs. Ltd. Partnership v. *Burlington*, 399 Mass. 771, 781 (1987).[17]

"Coercion" is defined as "the use of physical or moral force to compel [another] to act or assent." Webster's New Third Int'l Dictionary 439 (1981). It has been said that a direct deprivation of rights, even if unlawful, is not coercive because it is not an attempt to force someone to do something the person is not lawfully required to do. See *Longval* v. *Commissioner of Correction*, 404 Mass. 325, 333 (1989); *Pheasant Ridge Assocs. Ltd. Partnership* v. *Burlington*, *supra* at 781. Here, there was evidence that the board withheld its approval of the plaintiff's definitive plan in an effort to obtain a redesign of the intersection, although it could not lawfully do so.

We have recognized that by the Civil Rights Act, "the Legislature did not intend to create 'a vast constitutional [and statutory] tort,'" *Bally* v. *Northeastern Univ.*, *supra*, at 718, quoting *Bell* v. *Mazza*, 394 Mass. 176, 182 (1985), and that the insertion by the Legislature of the requirement of threats,

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[17] "Coercion" was defined for the jury as "the active domination of another's will." On the basis of the opinion in *Smith* v. *Longmeadow*, 29 Mass. App. Ct. 599, 603 (1990), the jury were further instructed that "adverse administrative action by some agency, such as a Planning Board, unless it is part of a scheme of harassment, does not amount to threats, intimidation or coercion and does not violate [the Act]." The judge explained that to harass someone was to "trouble[,] to worry or to torment someone, or to weary them, or to fatigue them to excess."

The plaintiff argues that because there was no objection to these instructions, they became the law of the case. We disagree. The defendants moved for a directed verdict on the claim under the Act on the basis that there was insufficient evidence, as matter of law, to satisfy the statutory requirement of threats, intimidation, or coercion. Although the written motion makes a rather bald assertion in this respect, the defendants' attorney thoroughly developed the position, in arguing that motion before the judge, that before a "scheme of harassment" could be found, there must be some evidence of animus against the plaintiff or his project, and an attempt to thwart the project, through adverse administrative action, unrelated to legitimate concerns of the board. The defendants were not required to object to the jury instructions to preserve this position for consideration on appeal. See *Brighetti* v. *Consolidated Rail Corp.*, 20 Mass. App. Ct. 192, 196 n.4 (1985), citing Mass. R. Civ. P. 50 (b), 65 Mass. 814 (1974).

intimidation or coercion was specifically intended to limit liability under the Act. *Bally* v. *Northeastern Univ., supra.* We doubt the Legislature contemplated that every legal error committed by a local planning board, having the intended effect of requiring a landowner to alter in some way his proposed use of his property, should necessarily give rise to liability under the Act. See *Silvia* v. *Building Inspector of W. Bridgewater*, 35 Mass. App. Ct. 451, 454-455 (1933) (reversing judgment for plaintiffs on claims brought under the Act because town, the losing party, had sought only to vindicate rights which it reasonably thought it possessed). Cf. *Young* v. *Planning Bd. of Chilmark*, 402 Mass. 841, 847 (1988) (denying costs to prevailing plaintiffs where planning board "acted neither in bad faith nor with gross negligence"). A local planning board, whose functions are in many respects discretionary and which involve the interpretation and application of highly technical laws and regulations, should be allowed to address matters within its realm of responsibility without exposure to liability under the Act every time its actions are overturned.

There was no evidence that the board attempted to exercise coercion against the plaintiff to force him to forgo development of his property. The board erroneously sought a concession (the improvement of the intersection) legitimately related to one of the purposes of the subdivision control law.[18] We conclude that the evidence does not support the imposition of liability under the Act, and that judgment n.o.v. should have entered for the defendants on these claims.

[18] We assume without deciding that certain forms of oppression or domination not involving physical force might constitute coercion under the Act, and we conclude that the defendants' efforts in this case to impose an unwarranted condition related to concerns about safety did not interfere with the plaintiffs' rights in the land by coercion. See *Pheasant Ridge Assocs. Ltd. Partnership* v. *Burlington*, 399 Mass. 771, 781 n.11 (1987). Compare *United States* v. *Beaty*, 288 F.2d 653, 654-658 (6th Cir.1961) (injunction entered to prohibit the use of economic pressure for purpose of coercing black residents to forgo the exercise of the right to vote).

4. In view of our disposition of these issues, we need not reach questions related to qualified immunity raised by the defendants.

5. The judgments are reversed. Judgments are to enter for the defendants.

So Ordered.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Charles Greenough, Defendant

JUDGMENT

This action came on for trial before the court and a jury, Barrett, J. presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That the plaintiff Eliot R. Freeman recover of the defendant Charles Greenough the sum of $50 on Count 1 with interest thereon at the rate of 12% per cent, from 12/20/88 in the sum of $22.56 as provided by law, and his costs of action.

Dated at Worcester, Massachusetts, this 18th day of Sept., 1992.

s/JOHN F. O'CONNOR
Assistant Clerk

Copies mailed 9-25-92

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Charles Greenough, Defendant

JUDGMENT

This action came on for trial before the court and a jury, Barrett, J. presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That the plaintiff Eliot R. Freeman recover of the defendant Charles Greenough the sum of $50 on Count 2 with interest thereon at the rate of 12% per cent, from 12/20/88 in the sum of $22.56 as provided by law, and his costs of action.

Dated at Worcester, Massachusetts, this 18th day of Sept., 1992.

s/JOHN F. O'CONNOR
Assistant Clerk

Copies mailed 9-25-92

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Kathleen Foreman, Defendant

JUDGMENT

This action came on for trial before the court and a jury, Barrett, J. presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That the plaintiff Eliot R. Freeman recover of the defendant Kathleen Foreman the sum of $50 on Count 1 with interest thereon at the rate of 12% per cent, from 12/20/88 in the sum of $22.56 as provided by law, and his costs of action.

Dated at Worcester, Massachusetts, this 18th day of Sept., 1992.

s/JOHN F. O'CONNOR
Assistant Clerk

Copies mailed 9-25-92

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Kathleen Foreman, Defendant

JUDGMENT

This action came on for trial before the court and a jury, Barrett, J. presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That the plaintiff Eliot R. Freeman recover of the defendant Kathleen Foreman the sum of $50 on Count 2 with interest thereon at the rate of 12% per cent, from 12/20/88 in the sum of $22.56 as provided by law, and his costs of action.

Dated at Worcester, Massachusetts, this 18th day of Sept., 1992.

s/JOHN F. O'CONNOR
Assistant Clerk

Copies mailed 9-25-92

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
The Town of West Boylston through The Planning Board, Defendant

JUDGMENT

This action came on for trial before the court and a jury, Barrett, J. presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That the plaintiff Eliot R. Freeman recover of the defendant The Town of West Boylston through The Planning Board the sum of $375,000 on Count 1 with interest thereon at the rate of 12% per cent, from 12/20/88 in the sum of $168,500.00 as provided by law, and his costs of action.

Dated at Worcester, Massachusetts, this 18th day of Sept., 1992.

s/JOHN F. O'CONNOR
Assistant Clerk

Copies mailed 9-25-92

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
The Town of West Boylston through The Planning Board, Defendant

JUDGMENT

This action came on for trial before the court and a jury, Barrett, J. presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That the plaintiff Eliot R. Freeman recover of the defendant The Town of West Boylston through The Planning Board the sum of $375,000 on Count 2 with interest thereon at the rate of 12% per cent, from 12/20/88 in the sum of $168,500.00 as provided by law, and his costs of action.

Dated at Worcester, Massachusetts, this 18th day of Sept., 1992.

s/JOHN F. O'CONNOR
Assistant Clerk

Copies mailed 9-25-92

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Charles Greenough, Defendant

VERDICT OF THE JURY FOR PLAINTIFF

9/Sitting, 1992

The jury find for the plaintiff on Count 1 and assesses damages in the sum of $50.00
—Fifty dollars—

ROLAND G. FAGAN
Foreman of the Jury

FILED
SEP 18 1992
Attest: Loring P. Lamoureux
Clerk

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Charles Greenough, Defendant

VERDICT OF THE JURY FOR PLAINTIFF

9/Sitting, 1992

The jury find for the plaintiff on Count 2 and assesses damages in the sum of $50.00

—Fifty dollars—

ROLAND G. FAGAN
Foreman of the Jury

FILED:
SEP 18 1992
Attest: Loring P. Lamoureux
Clerk

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Kathleen Foreman, Defendant

VERDICT OF THE JURY FOR PLAINTIFF

9/Sitting, 1992

The jury find for the plaintiff on Count 1 and assesses damages in the sum of $50.00

—Fifty dollars—

ROLAND G. FAGAN
Foreman of the Jury

FILED
SEP 18 1992
Attest: Loring P. Lamoureux
Clerk

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
Kathleen Foreman, Defendant

VERDICT OF THE JURY FOR PLAINTIFF

9/Sitting, 1992

The jury find for the plaintiff on Count 2 and assesses damages in the sum of $50.00

—Fifty dollars—

ROLAND G. FAGAN
Foreman of the Jury

FILED
SEP 18 1992
ATTEST: LORING P. LAMOUREUX
CLERK

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
The Town of West Boylston through The Planning Board, Defendant

VERDICT OF THE JURY FOR PLAINTIFF

9/Sitting, 1992

The jury find for the plaintiff on Count 1 and assesses damages in the sum of $375,000.00
three hundred seventy five thousand dollars—

ROLAND G. FAGAN
Foreman of the Jury

FILED
SEP 18 1992
ATTEST: LORING P. LAMOUREUX
CLERK

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT
CIVIL ACTION

No. 88-3632

Eliot R. Freeman, Plaintiff
v.
The Town of West Boylston through The Planning Board, Defendant

VERDICT OF THE JURY FOR PLAINTIFF

9/Sitting, 1992

The jury find for the plaintiff on Count 2 and assesses damages in the sum of $375,000.00
three hundred seventy five thousand dollars—

ROLAND G. FAGAN
Foreman of the Jury

FILED
SEP 18 1992
ATTEST: LORING P. LAMOUREUX
CLERK

COMMONWEALTH OF MASSACHUSETTS

Superior Court
Civil Action
No. 85-32782

WORCESTER, ss.

ELIOT R. FREEMAN

v.

KATHLEEN FOREMAN, CHARLES GREENOUGH, WARREN BLAISDELL, GEORGE BERNARDIN, BRUCE J. PENNINO, As MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON

JUDGMENT

This action came on to be heard before the Court, Barbara J. Rouse, J., presiding, and the issues having been heard and the Court having rendered a finding dated August 19, 1988,

It is ORDERED, ADJUDGED and DECLARED that:

the Planning Board of the Town of West Boylston exceeded its authority in disapproving the definitive plan as it relates to the proposed intersection.

Dated at Worcester, Massachusetts, this twenty-fourth day of August, A.D.1988

ANGELA R. MARZIELLO

Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

Superior Court
Civil Action
No. 85-32782

WORCESTER, ss.

ELIOT R. FREEMAN

v.

KATHLEEN FOREMAN & others[1]

MEMORANDUM AND ORDER

This matter is now before the court on the plaintiff's motion for Further Findings and Rulings. On October 9, 1986, after a trial without jury, this court (Rouse, J.) issued Findings of Fact, Rulings of Law, and Order for Judgment (the decision) remanding the case to the defendant, the Planning Board of the Town of West Boylston (the Board), for action consistent with the court's decision. In essence, the court annulled that part of the Board's decision which found that the plaintiff's definitive plan failed to provide adequate sight distances at a proposed intersection and affirmed that part of the Board's decision which found that the plaintiff's definitive plan failed to secure adequate provisions for drainage.

On October 15, 1987, after two hearings on the issue of the Board's non-compliance with the court's order to take action consistent with the decision, the court issued another order in which it directed the Board to review the plaintiff's drainage plan and to submit a written report to the court. On November 17, 1987, the Board issued revised findings of fact and conditions of approval which accepted the plaintiff's drainage revisions. The Board also voted to require additional documentation concerning the "safety and adequacy of the intersection designed for both vehicular and pedestrian traffic". The plaintiff challenged the condition requiring

[1] Charles Greenough, Warren Blaisdell, George Bernardin, Bruce J. Pennino, as members of the Planning Board of the Town of West Boylston.

documentation of the safety and adequacy of the intersection, as well as other conditions, in a motion for final judgment filed in December of 1987. On March 18, 1988, the court entered an order finding that the plaintiff's motion for final judgment was premature and ordered the Board to hold a public hearing forthwith, retaining jurisdiction of the matter.

Pursuant to this order, the Board, on May 9, 1988, held a public hearing and on June 20, 1988 voted to modify its approval and filed a certificate of planning board action dated June 24, 1988. The action essentially affirmed the Board's previous decision accepting the plaintiff's drainage plans but continued to include a condition that "applicants submit recognized and accepted technical documentation substantiating the safety adequacy of the intersection designed for both vehicular and pedestrian traffic".

Contrary to the court's decision of October 9, 1986, the Board is now attempting to require, as a condition of approval of the plan, that the plaintiff submit further documentation substantiating the safety and adequacy of the intersection designed. In its decision, of October 9, 1986, the court specifically found that the definitive plan satisfied the Board's regulation concerning sight distance; that the Board's decision to disapprove the definitive plan based upon allegedly inadequate intersection sight distance exceeded its authority and was invalid; and that the Board's rules and regulations relating to sight distance violated the standard of definitiveness required by law. See Findings of Fact, Rulings of Law, and Order of Judgment, dated October 9, 1986. Therefore, that portion of the Board's action dated June 24, 1988, which requires that the plaintiff submit further documentation substantiating the safety and adequacy of the intersection designed is in excess of its authority and is invalid. *Strand* v. *Planning Board of Sudbury*, 5 Mass. App. Ct. 18, 23 (1977).

This action is now ripe for entry of final judgment since the Board has now taken the action directed by this court in its decision and in its post trial orders. Specifically, the Board has accepted the plaintiff's drainage revisions, has held a

public hearing and has filed a certificate of action with the town clerk of West Boylston as required by G.L. c. 41, § 81u. See *Strand*, *supra* at 24.

ORDER FOR JUDGMENT

For all of the foregoing reasons, it is hereby ORDERED that judgment shall enter for the plaintiff Eliot R. Freeman declaring that the Planning Board of the Town of West Boylston exceeded its authority in disapproving the definitive plan as it relates to the proposed intersection.

BARBARA J. ROUSE

Barbara J. Rouse
Justice of the Superior Court

Dated: August 19, 1988

COMMONWEALTH OF MASSACHUSETTS

Superior Court
Civil Action
No. 85-32782

WORCESTER, ss.

ELIOT R. FREEMAN

v.

KATHLEEN FOREMAN & others[1]

MEMORANDUM AND ORDER

This matter is now before the court on the plaintiff's motion for final judgment. On October 9, 1986, after a trial without jury, this court issued Findings of Fact, Rulings of Law, and Order for Judgment remanding the case to the defendant, the Planning Board of the Town of West Boylston (the Board), for action consistent with the court's decision. In essence, the court annulled that part of the Board's decision which found that the plaintiff's definitive plan failed to provide adequate site distances at a proposed intersection and affirmed that part of the Board's decision which found that the plaintiff's definitive plan failed to secure adequate provisions for drainage.

On October 15, 1987, after two hearings on the issue of the Board's non-compliance with the court's order to take action consistent with its decision, the court issued another order in which it directed the Board to review the plaintiff's drainage plans and to submit a written report to the court. On November 17, 1987, the Board issued revised Findings of Fact and Conditions of Approval. The Board accepted the plaintiff's revised drainage plan subject to certain modifications as specified in an engineering report. The Board also voted to

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[1] Charles Greenough, Warren Blaisdell, George Bernardin, Bruce J. Pennino, as members of the Planning Board of the Town of West Boylston.

require a variety of subsequent revisions to the plan and to require additional documentation concerning, among other things, the safety and adequacy of the intersection design for both vehicular and pedestrian traffic. The plaintiff now challenges certain conditions which the Board has imposed including the requirement that a new public hearing must be held and requests the court to enter final judgment ordering the Board to approve the plan without a hearing and without regard to certain of the conditions.

The Board contends that an additional public hearing is required for the approval of the revised definitive plan which was amended in response to the Board's reasons for disapproving the earlier plan. G.L. c 41. § 81T requires a public hearing to insure that other interested persons have a right to be heard on the question of whether the amended plan conforms to the Board's rules and regulations. *Pieper* v. *Planning Board of Southborough*, 340 Mass. 157, 160-161 (1959). See *Doliner* v. *Planning Board of Millis*, 343 Mass. 1, 5, 8 (1961). The Board has an obligation to give interested parties an opportunity to be heard before approving or disapproving a plan. G.L. c. 41, § 8T. Any person, whether or not a party to the proceedings, who is aggrieved by the Board's decision, has the right to file a timely appeal pursuant to G.L. c. 41, § 81BB. *Patelle* v. *Planning Board of Woburn*, 6 Mass. App. Ct. 951, 952 (1978) (rescript).

The fact that the plaintiff has submitted a revised plan does not vitiate the statutory requirement of a hearing. As the court stated in *Patelle*, "[o]n any . . . amended plan by which the developer seeks to have the Board 'revoke its disapproval and approve a plan which as amended conforms to [the planning board's] rules and regulations or recommendations' (§ 81 u), the objectors (as well as the developer) have the right to be heard on the question whether the amended plan conforms to those rules and regulations or recommendations." *Id.* It is only after the statutory hearing of which all interested persons have notice and in which they can participate, that a proper evaluation of a proposed plan can be obtained. G.L. c. 41

§ 81T. The court's proper role is to determine whether the Board exceeded its authority in approving the plan aired at the public hearing. *Strand* v. *Planning Board of Sudbury*, 5 Mass. App. Ct. 18, 23 (1977).

Thus, an entry of final judgment is premature and it is not necessary for the court to reach at this time the other issues raised by the plaintiff. The Board shall hold a public hearing expeditiously as required by the statute. G.L. c. 41, § 81T.

ORDER

For all the foregoing reasons, it is hereby ORDERED that the Planning Board of the Town of West Boylston conduct a public hearing on the proposed plan forthwith. The court shall retain jurisdiction of this matter.

BARBARA J. ROUSE

Barbara J. Rouse
Justice of the Superior Court

DATED: March 18, 1988

A true copy by photostatic process.
Attest: Angela R. Marzillo
Asst. Clerk

COMMONWEALTH OF MASSACHUSETTS

Superior Court
Civil Action
No. 85-32782

WORCESTER, SS.

ELIOT R. FREEMAN

v.

KATHLEEN FOREMAN & others[1]

ORDER

On October 9, 1986, after a trial without jury, this court issued Findings of Fact, Rulings of Law and Order for Judgment (Decision) remanding the case to the defendant, West Boylston Planning Board (the Board) for action consistent with the court's Decision. In essence, the court annulled that part of the Board's decision which found that the plaintiff's definitive plan failed to provide adequate sight distance at a proposed intersection and affirmed that part of the Board's decision which found that the plaintiff's definitive plan failed to secure adequate provisons for drainage.

With respect to drainage the Board had found that "the runoff from the developed site for the 25 year *and* the 100 year event exceeds the 25 year rate of runoff from the undeveloped site." (Emphasis supplied). The court held that the Board's Rules and Regulations require that a developer's drainage plans be measured by the stated criteria, the 25 year storm event, and that the application of the 100 year storm event standard was not permissible because it exceeded the requirements specified in the Rules and Regulations. However, the court affirmed the Board's action because the Board determined that the plaintiff's proposed drainage

[1] Charles Greenough, Warren Blaisdell, George Bernardin, Bruce J. Pennino, as Members of the Planning Board of the town of West Boylston.

system, as measured by the 25 year event, was inadequate, and that, therefore, the 100 year event was not relevant in reviewing the Board's decision.

Since the judgment of remand, the plaintiff has resubmitted his plans to the Board of Health in order to satisfy the requirement that he obtain Board of Health approval. By letter dated November 13, 1986, the Board of Health reported to the Board that it had no objection to the plaintiff's plan. With respect to the drainage issue, the plaintiff filed revised plans and amended drainage calculations proposing additional methods of mitigating off-site runoff.

At the plaintiff's request, the court has held two hearings on the issue of the Board's non-compliance with the court's Order to take action consistent with the Decision. On August 5, 1987, upon hearing of a post-trial motion by the plaintiff, this court ordered the Board to take the action upon remand required by the Order for Judgment by August 25, 1987. By agreement of the parties, that deadline was postponed to September 14, 1987, the next scheduled Board meeting. On that day, the Board voted to require the plaintiff to construct a "through street" in the subdivsion but did not act with respect to drainage. It is undisputed that the Board has not issued a decision relating to the plaintiff's revised drainage plans.

The Board is hereby ORDERED to review immediately the plaintiff's plans and calculations relating to drainage, limiting its review to the issue of whether the plans comply with the applicable law and regulations as the latter were discussed in the Decision of October 9, 1986; specifically, whether the plaintiff's plan contains adequate measures to mitigate increases in off-site runoff utilizing the 25 year storm event in measuring both the pre-development and post-development rates of runoff.

The Board's action approving or disapproving the plaintiff's plans shall be in writing. If the Board does not approve the plaintiff's plans, the Board shall state with particularity the reasons for disapproval. The Board's written action shall be submitted to the court, with a copy to plaintiff's counsel, no

later than November 17, 1987.

The plaintiff shall submit all drainage plans and calculations to the Board no later than October 30, 1987.

BARBARA J. ROUSE

Barbara J. Rouse
Justice of the Superior Court

DATED: October 15, 1987

Copies Mailed
Oct. 19, 1987

Town Clerk/
J. Burgoyne, Esq.
S. DesSimone, Esq./s

COMMONWEALTH OF MASSACHUSETTS

Superior Court
Civil Action
32782

WORCESTER, ss.

ELIOT R. FREEMAN,

v.

KATHLEEN FOREMAN, CHARLES GREENOUGH, WARREN BLAISDELL, GEORGE BERNARDIN, BRUCE J. PENNINO, AS MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON

JUDGMENT

This action came on for trial before the Court, Rouse, J. Presiding, and the issues having been duly heard and findings having been rendered,

It is ORDERED and ADJUDGED:

1. That the decision of the Board, dated October 24, 1985 that the definitive plan failed to secure adequate provisions for drainage and drainage impact, is AFFIRMED.

2. That the Board's decision, dated October 24, 1985, that the definite plan failed to provide adequate "sight distances" at the proposed intersection of Lost Oak Pond and Prospect Street is ANNULED; and

3. That the case is remanded to the Board for action consistant with this decision.

Dated at Worcester, MA this 17th day of October, 1986.

LORING P. LAMOREUX
Assistant Clerk

copies mailed 10/17/86 z
J. BURGOYNE
Town Clerk

COMMONWEALTH OF MASSACHUSETTS

Superior Court
Civil Action
No. 85-32782

WORCESTER, ss.

ELIOT R. FREEMAN

v.

KATHLEEN FOREMAN & others[1]

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

BACKGROUND

Plaintiff, Eliot R. Freeman, ("the developer"), brings this action, pursuant to G.L. c.41 §81BB, against the Planning Board of the Town of West Boylston ("the Board") which disapproved a definitive plan of subdivision submitted by him for development of residential lots. The developer contends that the Board erred and exceeded its authority in disapproving his plan for reasons relating to drainage and runoff, traffic safety, road design, and sight distances and in requiring the developer to secure the untimely approval of the Board of Health for the development. The Board contends that it properly applied its rules and regulations concerning subdivision plans. The developer seeks to have the court remand the matter to the Board for approval of the plan consistent with the court's decision.

At the request of both parties, the court took a view of the property involved. This matter was tried before the court without a jury. Based upon all the credible evidence, the view, and the written submissions by the parties, I make the

[1] Charles F. Greenough, Warren Blaisdell, George Bernardin, Bruce J. Pennino, as members of the Planning Board of the Town of West Boylston.

following findings of fact and rulings of law.

FINDINGS OF FACT

1. In February of 1982, plaintiff, Eliot R. Freeman, became the owner of 75 acres of farmland in the Town of West Boylston which was zoned for residential use.

2. The developer intended to develop the land into residential lots for single family dwellings in two phases.

3. The first phase of development, now completed, consisted of a 26-acre parcel, referred to as Marsh Hawk Way and was subdivided into six house lots and seven acres held under conservation.

4. The second phase of development concerned approximately 50 acres and was the subject of a preliminary subdivision plan, entitled "Lost Oak Road", submitted by the developer to the Board on or about January 21, 1985. The preliminary plan proposed thirteen lots on a dead-end street extending from Prospect Street approximately 1,700 feet and two lots on a dead-end street extending from Goodale Street.

5. On October 5, 1984, the Board adopted, pursuant to G.L.c.41, §81Q, Rules and Regulations Governing the Subdivision of Land in the Town of West Boylston which were revised on February 17, 1987, and on April 2, 1984 ("the Rules and Regulations").

6. At its meeting on January 21, 1985, the Board voted to refer the preliminary plan to its consulting engineer, Michael Rafferty ("Rafferty"), a registered professional engineer, whom the Board had employed on many previous occasions.

7. By a report dated March 15, 1985, Rafferty noted that the major issues were: (a) street classification; (b) downstream drainage impacts; and (c) on-site sewage disposal. The report also suggested that the developer, prior to submitting a definitive plan, demonstrate the adequacy of sight distances at entrances onto both Prospect Street and Goodale Street. This report was made available to the developer.

8. On March 19, 1985, the Board disapproved the preliminary plan, finding that the long, dead-end proposed street was unacceptable and inconsistent with the Town of Boylston's master plan, that the lots did not show the required sidewalks, and that the lots did not conform to zoning requirements. The Board also directed the developer's attention to Rafferty's comments concerning drainage and on-site sewer disposal as contained in his March 15, 1985, engineering review.

9. On or about August 26, 1985, the developer submitted to the Board a definitive plan of subdivision entitled "Lost Oak Road", pursuant to G.L. c.41 §81K *et seq.*

10. The definitive plan proposes a residential subdivision consisting of fifteen building lots which range in size from 1.7 to 5.6 acres, with a median area of 3.2 acres. The submission to the Board consisted of layouts, street profiles, construction plans, a request for waivers, enclosures containing results of soil tests, calculations of rates of runoffs, and proposed storm drainage systems.

11. The definitive plan depicts two proposed streets to service the fifteen lots. Loast Oak Road extends 1,850 feet west of Prospect Street, ends in a cul-de-sac and serves thirteen lots. The second street, Acorn Path, extends 330 feet east of Goodale Street, serves two lots and also ends in a cul-de-sac. Both Prospect and Goodale Streets are two-lane, undivided, residential streets which are rural/residential in character. A golf course and country club abutts the property on both sides of Prospect Street.

12. On September 30, 1985, the Board held a public hearing on the developer's plan. At the public hearing, Rafferty presented a report of his review of the developer's submissions and summarized his findings. Persons attending the hearing raised questions concerning: (a) the potential runoff of water resulting from the proposed subdivision; (b) the increase in traffic on Goodale Street; and (c) the steep grade and icy road condition on Prospect Street related to the proposed intersection of Lost Oak Road and Prospect Street.

13. As a result of comments made at the public hearing, the Board requested Rafferty to evaluate further the proposed intersection of Lost Oak and Prospect Street.

14. On or about September 20, 1985, the Board of Health informed the Board that it was withholding any recommendation about the definitive plan "due to lack of information".

15. By letters dated October 12 and 16, 1985, Rafferty advised the Board that the sight distance requirements and measurements should be based on a stop sign and line located 30 feet from the edge of pavement of Prospect Street with a driver positioned 10 feet behind the stop line. He also suggested that "it would be an accepted design practice to adjust the required minimum sight distance to the south from 275 feet to 325 feet."

16. The Board, after receiving supplemental reports from Rafferty dated October 12 and October 16, 1985, voted to disapprove the definitive plan.

17. The Board's written decision disapproving the plan, dated October 24, 1985, ("the decision") states that the definitive plan fails to comply with the Rules and Regulations of the Board Governing Subdivision of Land. The Board cites two primary reasons for disapproving the definitive plan. The Board found that the definitive plan failed to secure adequate provisions for drainage impact on the environment, specifically off-site runoff. The Board also found that the proposed intersection at Lost Oak Road and Prospect Street lacked adequate "sight distances" to insure through the lots by ways which would be "safe and convenient for travel."

18. The Rules and Regulations of the Board, Section IV, E2, contains the following requirement:

> The storm drain system for the proposed development shall be designed so that the p rate of discharge at points where runoff collected by the street drainage system leaves the subdivision shall not exceed the peak state of discharge from the site as it presently exists in its undeveloped state. The criteria to be used to establish the peak

> rate of discharge from the site as it presently exists is that peak rate of runoff associated with a 25 year storm. . . .

19. A "25 year storm" is as storm whose intensity and amount of rainfall is such that it is statistically likely to be experienced only once every 25 years. The "100 year storm" is a storm whose intensity and amount of rainfall is such that it is statistically likely to be experienced only once every 100 years. The 100 year storm produces a greater rate of runoff than a storm which is statistically likely to be experienced within a time period of less than 100 years.

20. The definitive plan proposed two primary methods to deal with runoff. The developer's engineer, James Kalloch ("Kalloch"), proposed installing a series of underground drains which would drain approximately 20 acres of the development. Secondly, Kalloch proposed to route runoff into the Lost Oak Road drain which would channel runoff into natural swales, and then into a natural wetland leading into the Malden Brook. The developer contends that these methods insure that the runoff after development would not exceed the peak rate of discharge from the site prior to development.

21. The Board concluded that the definitive plan failed to comply with the Section IV, E2 of the Board's Rules and Regulations regarding a zero increase in the rate of runoff post-development. The Board found that the definitive plan failed "to reasonably address and mitigate drainage impacts on the environment."

22. Specifically, the Board found that the runoff from the developed site for the 25 year and the 100 year storm events exceeds the runoff from the undeveloped site. The Board states that it included the 100 year event because that is the criterion used by the Conservation Commission in evaluating submissions under the Wetlands Protection Act.

23. The Board found that the developer had failed to substantiate its drainage calculations "with recognized and accepted state of the art technical documentation."

24. The definitive plan depicts available corner sight distances from Lost Oak Road onto Prospect Street of 1,000 feet to the south and 1,300 feet to the north. These distances were measured from a point in the centerline of the proposed road, and were based upon a viewing height of 3.5 feet above the road to an object 4.25 feet high. These standards of measurement are consistent with the United States Department of Transportation as set forth in the manual of Uniform Traffic Control Devices.

25. The Board found that the required sight distances must be measured to and/or from a point on the proposed roadway which is 40 feet off the westerly edge of the pavement on Prospect Street. The figure of 40 feet was "based on a vehicle at a stop sign placed at a point 30 feet off the paved edge of Prospect Street with a driver located 10 feet behind the stop line."

26. There is no mention or provision in the Rules and Regulations regarding stop signs.

27. With respect to sight distances, the Board's Rules and Regulations contain only one specific requirement which states that there be a "minimum stopping sight distance of 275 feet."

28. With respect to sight distances, the Board disapproved the definitive plan because, when measured from a point 40 feet from the edge of Prospect Street pavement, vehicles entering Prospect Street traffic would not have sufficiently safe "sight distances" in northerly and southerly directions.

29. The Board also found that, "because of the grade on Prospect Street, and in accordance with accepted design procedures, the required minimum sight distance of 275 feet is to be adjusted to provide for at least 325 feet to the south to compensate for the effects of the steep downgrade for northbound vehicles approaching the intersection" and that the required minimum sight distance to the north is 275 feet.

30. In its decision, the Board indicated that the Board of Health advised that it had insufficient information to make a recommendation relative to the suitability of lots for septic

systems. The Board required the developer to obtain approval of the Board of Health prior to submitting any further data to the Board.

31. The Board decided to classify the streets shown on the definitive plan as "residential feeder streets."

RULINGS OF LAW

1. The function of this court in deciding this case is to "hear all pertinent evidence and determine the facts, and upon the facts so determined, [to] annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require." G.L. c. 41, §81BB.

2. The court should confine its review to reasons stated by the Board for disapproving the definitive plan. *Carter* v. *Planning Board of Westborough*, 4 Mass. App. Ct. 306, 307 (1976).

3. The developer has the burden of proving that the Board exceeded its authority in disapproving the definitive plan and that the Board's decision is invalid. *Fairbairn* v. *Planning Board of Barnstable*, 5 Mass. App. Ct. 171, 173 (1977).

4. The developer must obtain the approval of the Board before the land can be subdivided. G.L. c.41, §81O.

5. The subdivision control law, G.L. c.41, §§81K to 81GG, has been enacted for the purpose of "protecting the safety, convenience, and welfare of the inhabitants of cities and towns. . . ." G.L. c.41, §81M.

6. The subdivision control law contemplates general standards to be applied specifically by the local planning board. *North Landers Corp.* v. *Planning Board of Falmouth*, 382 Mass. 432, 443 (1981).

7. A planning board is required to adopt "reasonable rules and regulations" relating to subdivision control which are not inconsistent with the subdivision control law or with any other statute, valid ordinance or by-law. G.L. c.41, §81Q.

8. The subdivision plan, submitted to the Board by preliminary plan on January 25, 1985, is governed by the zoning by-laws and subdivision Rules and Regulations of the Board in

effect as of January 21, 1985 which were originally adopted on October 5, 1954, and revised on February 17, 1981, and on April 2, 1984.

9. Planning board regulations may be enforced only to the extent that they are "comprehensive, reasonably definite, and carefully drafted, so that the owners may know in advance what is or may be required of them and what standards and procedures will be applied to them." *Castle Estates, Inc. v. Park and Planning Board of Medfield*, 344 Mass. 329, 334 (1962).

10. Within the rules of definiteness, the Board does have flexibility to tailor decisions to the specific facts and circumstances of each case. *North Landers Corp., supra* at 443. The standard of definiteness "is offended when local boards have introduced reasons not specified in the published regulations." *Id.* at 444.

11. Drainage means the control of surface water within the tract of land to be subdivided. G.L. c.41, §81L.

12. Section IV, E2 of the Board's Rules and Regulations provides that "[t]he storm drain system for the proposed development shall be designed so that the p rate of discharge at points where runoff collected by the street drainage system leaves the subdivision shall not exceed the peak rate of discharge from the site as it presently exists in its undeveloped state. The criteria to be used to establish the peak rate of discharge from the site as it presently exists is that the peak rate of runoff associated with a 25 year storm." This regulation clearly requires that the peak rate of runoff, after development, as measured by the 25 year storm event, not exceed that same rate of runoff before development. It meets the standard of definiteness as articulated in *Castle Estates, supra* at 334.

13. The Board found that "the runoff from the developed site for the 25 year and the 100 year event exceeds the 25 year rate of runoff from the undeveloped site." The Board's Rules and Regulations require that a developer not exceed the predevelopment runoff rate as measured by the 25 year event and therefore the developer cannot be held to the 100 year storm

event standard. A requirement that a developer buffer any storm up to the 100 year event to rates of runoff not exceeding the 25 year storm before development would require that the post-development rate of runoff be less that the pre-development rate. However, since the Board determined that the developer's proposed drainage systems, as measured by the 25 year event, were not adequate to insure that the post-development rate of development would not exceed the same rate of runoff before development, the 100 year storm event criterion is not relevant in reviewing the Board's decision.

14. The developer's contention that the Board erred in rejecting the engineering standards and systems proposed by him to mitigate any increase in runoff is without merit. "To the extent [an administrative board] act[s] on engineering data which point[s] to different conclusions from those to be drawn from data submitted by the plaintiff, the plaintiff [is] entitled to a hearing at which he might rebut such other data, or the conclusions to be drawn from them." *Vitale v. Planning Board of Newburyport*, 10 Mass. App. Ct. 483, 487 (1980). The developer was given such an opportunity to rebut the engineering data and methods used by the Board as well as the conclusions drawn by them, and the Board was not persuaded.

15. The Board's decision to disapprove the developer's plan with respect to drainage systems did not exceed its authority and is valid.

16. The subdivision control law requires "adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; the lessening of congestion in such ways and in the adjacent public ways; for reducing the danger in life and limb, and operation of motor vehicles . . ." G.L. c.41, §81M.

17. Section IV, A(l) (a) of the Rules and Regulations provides that "[a]ll streets in the subdivision shall be designed so that, in the opinion of the Board, they will provide safe vehicular travel."

18. The only regulation of the Board which deals specif-

ically with sight distance is a provision in Table 1, Roadway Design Criteria, which states "minimum stopping sight distance" 275 feet.

19. The definitive plan, which depicted sight distances from Lost Oak Road onto Prospect Street of 1,000 feet to the south and 1,300 feet to the north, measured from a point 12 feet from the edge of Prospect Street pavement, satisfied the Board's regulation concerning a "minimum sight distance" of 275 feet.

20. The Board's Rules and Regulations contain "no explicit provisions permitting the Board to require that the subdivision plan shall contain provision for" a sight distance measured to and/or from a point in the proposed roadway which is 40 feet from the edge of the pavement of the intersecting street. *Castle.*

21. The Board's Rules and Regulations relating to stopping sight distance are not "comprehensive, reasonably definite, [or] carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them." *Id.*

22. Therefore, the Board's decision to disapprove the developer's definitive plan on the grounds that, when measured from a point 40 feet from the edge of Prospect Street pavement, vehicles entering Prospect Street traffic would not have sufficiently safe "sight distances", exceeded its authority and is not valid.

23. The subdivision control law requires that the developer submit his plan to the Board of Health for review and approval. G.L. c.41 §81M, §81U.

24. The Board's decision to require the developer to obtain approval of the Board of Health prior to submitting any further data to the Board did not exceed its authority. G.L. c.41, §81U.

25. The power of the Board under the subdivision control law shall be exercised with due regard for "coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the

ways in neighboring subdivisions . . ." G.L. c.41, §81M.

26. The Board's action classifying the streets depicted on the definitive plan as "residential feeder streets" was a proper exercise of its power and did not exceed its authority. G.L.c.41, §81M.

ORDER FOR JUDGMENT

It is therefore ORDERED that:

(1). the Board's decision, dated October 24, 1985, that the definitive plan failed to secure adequate provisions for drainage and drainage impact, be AFFIRMED;

(2). the Board's decision, dated October 24, 1985, that the definitive plan failed to provide adequate "sight distances" at the proposed intersection of Lost Oak Road and Prospect Street is ANNULED; and

(3). that the case is remanded to the Board for action consistent with this decision.

BARBARA J. ROUSE

Barbara J. Rouse
Justice of the Superior Court

DATED: October 9, 1986

Copies mailed
10/17/86
J. BURGOYNE
Town Clerk
S. DESIMONE

Supreme Court, U.S.
FILED
AUG 24 1995
CLERK

(2)

No. 95-145

In The

Supreme Court of the United States

October Term, 1995

ELIOT R. FREEMAN,

Petitioner,

vs.

TOWN OF WEST BOYLSTON, CHARLES GREENOUGH and KATHLEEN FOREMAN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

RESPONDENTS' BRIEF IN OPPOSITION

JOYCE FRANK
Counsel of Record
ELIZABETH A. LANE
MICHELE E. RANDAZZO
KOPELMAN AND PAIGE, P.C.
Attorneys for Respondents
101 Arch Street
Boston, Massachusetts 02110
(617) 951-0007

BEST AVAILABLE COPY

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Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts correctly reversed judgments for the Petitioner on his substantive due process claim where Petitioner based his claim, both at trial and on appeal, upon the substantive due process standard articulated by the Court of Appeals for the First Circuit.

2. Whether a conflict exists between the standard applied by the Massachusetts Supreme Judicial Court to the Petitioner's substantive due process claim and the standard applied by the Court of Appeals for the First Circuit and other federal courts to comparable claims such as to require clarification of the standard by this Court.

3. Whether the case below presents an appropriate record to address and resolve real or perceived variations in the circuit courts' articulation of the standard for substantive due process claims where, to avoid a manifestly unjust result to the Respondents, reversal of the standard applied would necessitate examination of procedural issues by which the Supreme Judicial Court declined to address the existence of a constitutionally protected property interest prerequisite to a successful substantive due process claim.

4. Whether the case below presents an appropriate record to address and resolve real or perceived variations in the circuit courts' articulation of the standard for substantive due process claims where qualified immunity and the absence of an impermissible pattern, practice or policy provide independent grounds to sustain the judgment below.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions referenced by Petitioner in his Petition for a Writ of Certiorari, the Respondents rely upon the following authorities:

> Massachusetts Subdivision Control Law [hereinafter "SCL"], Mass. Gen. L. ch. 41, §§ 81M, 81O, 81Q, 81R, 81T, 81U, 81W, and 81BB (1994) (reproduced in pertinent part in the Respondents' Appendix A, attached hereto).
>
> Fed. R. Civ. P. 51
> Mass. R. Civ. P. 51(b) (Quoted herein).
>
> Rules and Regulations Governing the Subdivision of Land, West Boylston, Massachusetts, Sections IV.A.1.a and IV.A.2.e and Table 1 (Quoted, in pertinent part, herein).

STATEMENT OF THE CASE

A. Facts and Law

In his zeal to reach a basis for review of sufficient magnitude, Petitioner has mischaracterized the record and pivotal state law in several critical instances. These mischaracterizations primarily center around the degree of discretion conferred by Massachusetts law upon planning boards in general and the Respondents in particular in the context of the state proceedings below, and in Petitioner's characterization of the series of interim orders of the judge to whom he appealed the planning board's disapproval of his initial subdivision plan.

As a preliminary matter, to evaluate the interim orders, it is important to recognize that Petitioner submitted two plans. The initial plan, submitted to the Board on August 26, 1985 (R. 40, ¶12), was disapproved on October 24, 1985 (R. 165-72). A revised plan, incorporating newly submitted drainage revisions, was not submitted until two years later, on October 21, 1987 (R. 341-51), after the state superior court judge ordered Petitioner to submit all drainage plans and calculations to the Board no later than October 30, 1987. (Petitioner's App. A-43).[1] The Board promptly voted, on November 16, 1987, to approve the revised plan, subject to conditions (including the condition that a public hearing be held). (R. 238-43). Petitioner refused to submit to a public hearing until the superior court judge, on March 18, 1988, ordered him to do so, declaring that "[t]he fact that the plaintiff has submitted a revised plan does not vitiate the statutory requirement of a hearing." (Petitioner's App. A-39). Issuance, in June, 1988, of a Certificate of Planning Board Action approving the revised plan (R. 252-54) followed swiftly on the heels of a May, 1988 public hearing. (R. 250-51). Petitioner challenged one of the conditions of approval, requiring intersection safety documentation (Trial Transcript 201-03) [hereinafter "T.T."], which was then stricken by the judge on August 24, 1988. (R. 261).[2]

---

1. During the intervening period, the Board's consulting engineer had continued to review revised drainage calculations submitted by Petitioner in March, May and August of 1987, finding them inadequate to meet "the court mandated standards" for 25 year storm events as set forth by the judge in a decision dated October 9, 1986. (Petitioner's App. A-52 - A-53; R. 201-08, 214-26, 229)

2. An abutter's appeal was settled in March of 1989 (T.T. 208; R. 267-76), removing the statutory obstacle to plan endorsement of nearly nine months from the Board's June 1988 Certificate of Planning Board Action. (Petitioner's App. A-11). Thereafter, the Board promptly endorsed the revised plan on April 18, 1989 (R. 278).

When Petitioner, at 6, refers to delays in his ability to "proceed with his development" from the time of his original "proposal," he glosses over the fact that he actually submitted two different plans two years apart. He thus avoids disclosing the length of his own delay in submitting a revised plan and, in turn, his refusal to submit the revised plan to a statutorily required public hearing at which "objectors (as well as the developer) have the right to be heard" (Petitioner's App. A-39) and from which aggrieved abutters might, and indeed did, appeal a vote of plan approval. Mass. Gen. L. ch. 41, § 81BB. (R. 267-76; T.T. 208). In fact, as this chronology indicates, during the nineteen month period between the October, 1986 remand order and a public hearing on the plan held on May 9, 1988 (R. 250-51),[3] at least sixteen of the nineteen months' delay were caused solely by Petitioner's own delay in submitting conforming drainage plans (twelve months) and his refusal to submit to a statutorily mandated public hearing (four months).

As to the applicable state law, Petitioner, at 4, mischaracterizes Mass. Gen. L. ch. 41, § 81K, *et seq.* — the comprehensive body of laws and procedures known as the Subdivision Control Law (SCL) — as bestowing "no discretionary authority" upon local planning boards, in direct contradiction of the decision of the Supreme Judicial Court below (Petitioner's App. A-20) and the orders of the superior court judge upon which Petitioner relies. (*See* Petitioner's App. A-39 - A-40, A-53, ¶14).

In fact, a planning board has considerable discretion pursuant to the SCL in that it may set discretionary local standards for the safe design and construction of roadways. Such standards take the form of "reasonable rules and regulations,"

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3. Petitioner's civil rights complaint sought damages for a one and a half year delay "after [the judge's] remand order." (R. 45, ¶31).

commonly referred to as "subdivision regulations," which, as described in Section 81Q of the SCL, are highly discretionary in nature, circumscribed only by the purposes set out in Section 81M. Pursuant to Section 81R, ¶52, it may also, when engaged in definitive plan review, decide whether to strictly enforce or waive in whole or in part such regulations, *Mac-Rich Realty Constr., Inc. v. Planning Bd. of Southborough*, 4 Mass. App. Ct. 79, 85 (1976); *Canter v. Planning Bd. of Westborough*, 7 Mass. App. Ct. 805, 812 (1979), and may choose whether to simply disapprove a legally deficient plan or to in effect cure such defect for the applicant by approving it as modified by conditions. Mass. Gen. L. ch. 41, § 81U, ¶2.

Once a plan, such as Petitioner's initial plan, has been acted upon, a court on appeal may not substitute its discretion for that of the board. *Strand v. Planning Bd. of Sudbury*, 5 Mass. App. Ct. 18, 22-24 (1977). Only where it can find *no* supportable basis for disapproval may a reviewing court remand the matter for a public hearing to permit the board to further articulate its basis for disapproval. *See, e.g., Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 179 (1977).

Such further articulation was not necessary here, where, contrary to Petitioner's representation, at 4, the superior court judge *upheld* the disapproval on two valid grounds — drainage and the absence of board of health review pursuant to Mass. Gen. L. ch. 41, §§ 81M and 81U. (Petitioner's App. A-6).[4]

Petitioner's assertion, at 5, that "the court annulled the Planning Board's decision on the grounds that it exceeded the board's authority," ignores the statement in the same order that

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4. Hence, Petitioner's assertion, at 4, that "[i]t is undisputed that the first two grounds [of disapproval cited by Petitioner] exceeded the regulations of the Planning Board" is not true.

the Board's decision was "AFFIRMED" (Petitioner's App. A-44) and is, therefore, more than just a benign half-truth. Rather, Petitioner misstates both fact and law, since, under Massachusetts law, planning board disapproval is valid where any single valid basis for disapproval has been identified and the reviewing authority has no authority to annul it. *Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 179 (1977); *Loring Hills Developers Trust v. Planning Bd. of Salem*, 374 Mass. 343, 352 (1978).[5]

Remand of the matter to the planning board, after upholding disapproval on two grounds, was, therefore, confusing indeed. Petitioner's construction of the language of the judge's interim order, seeking "action consistent with this decision" (Petitioner's App. A-44 - A-45), as compelling approval of his plan simply cannot be reconciled with the court's statutory authority. *Fairbairn*, 5 Mass. App. Ct. at 179; *Loring Hills*, 374 Mass. at 352. In addition, contrary to the Petitioner's representation, at 5, and as the Supreme Judicial Court observed,

> [n]owhere in that decision was it stated that the board's sole remaining responsibility was to accept and consider additional material from the plaintiff concerning drainage. Also, nowhere in that decision was it suggested that the board had forfeited the right to insist on compliance with the through street requirement. The board's failure to do at this

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5. Petitioner also misstates the literal terms of the sight distance regulation, Section IV.A.2.e, when, at 4, he states that the Board "increased" the sight distance from 275 feet. The regulation provides that 275 feet is the "*minimum* stopping sight distance" that shall be required. IV.A.2.e and Table 1 (emphasis added) (R. 141, 149). *See also* Petitioner's App. A-4 n.4; *Canter*, 7 Mass. App. at 811 ("normally" in regulation allows discretionary case by case determination).

> point what the plaintiff contends it was required to do was neither irrational nor obviously at odds with the judge's order. In fact, as subsequent events established, the October, 1986, order did not instruct the board that its sole remaining responsibility vis-a-vis the plaintiff's plan was to consider data related to drainage, since the judge subsequently agreed with the board that it was also required to hold an additional public hearing on amendments to the plaintiff's plan.
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> * * *
>
> [A]s late as March, 1988, the judge agreed with the board's position to the extent of ordering a new public hearing, and declined to instruct the board that it must confine itself to considering the drainage issue.

(Petitioner's App. A-15; *see also* Petitioner's App. A-39 - A-40).

In upholding the planning board's requirement of the statutory hearing, the judge, as previously noted, declined to rule on the Board's other articulated conditions of approval, concluding that it was premature to reach the other issues. (Petitioner's App. A-39 - A-40; R. 244-46). Hence, the judge let stand conditions of approval of the revised plan previously voted at the Board's November 16, 1987 meeting, including (in addition to the public hearing requirement) the condition that Petitioner submit documentation of the safety of the intersection design (R. 240, ¶B.d) and a reiteration of a previous denial of

Petitioner's request for a waiver of the through street regulation (R. 241, ¶D.b).[6]

At the May, 1988 public hearing, several abutters spoke against requiring a through street. (R. 250-51). Accordingly, at its meeting on June 20, 1988, the Board voted to grant the plaintiff's request to waive the through street (R. 388), and, on June 24, 1988, issued a Certificate of Planning Board Action approving plaintiff's subdivision plan as revised by drainage design

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6. The Board also voted to include a condition in its Certificate of Planning Board Action that its "revised findings of fact and conditions of approval are deemed by the Court to be consistent with the Remand Order." (R. 238, ¶1). As such, contrary to Petitioner's assertion, at 5, the Board was attempting to comply with the order of the judge and not acting "in violation of that order." Since, as the Supreme Judicial Court determined, the judge did *not* require the Board to limit its decision to drainage only (Petitioner's App. A-15), it is impossible to say the Board "knew" the opposite, as Petitioner, at 5-6 and 6 n.4, contends. In fact, nowhere in the testimony cited by Petitioner, at 6 n.4, did Respondents "admit[] . . . the Board deliberately and intentionally violated" the judge's orders or "flagrantly disregarded . . . the advice of its own counsel" as asserted, at 6 n.4, by Petitioner. Both Foreman and Greenough testified that they were confused by the remand order (T.T. 436, 430, 734) and believed there were additional discretionary issues before the Board left unaddressed by the judge's order (such as whether to waive the Board's through street requirement) (T.T. 481) and their counsel had confirmed that view by indicating that the topic of intersection design remained open for discussion. (Petitioner's App. A-16; R. 299-300, 379). Furthermore, the Board's consulting engineer advised the Board that, although the judge had ruled that the Board did not have authority to impose additional sight distances beyond the "*minimum* stopping sight distance" (emphasis added) of 275 feet contained in Section IV.A.2.e of the Board's regulations (R. 141, 149), "the Court did not relieve the applicant's engineer from his professional obligation to use reasonable design standards . . . and to convince [the] Board that he had done so" in the form of intersection safety documentation. (R. 377, 379). As such, contrary to Petitioner's assertion, at 6, the requirement of intersection safety documentation was *not* "the very same issue" which the trial judge had ruled on at trial, nor does the record suggest the Board believed it to be the same.

modifications, subject, among other conditions, to submittal of "recognized and accepted technical documentation substantiating the safety and adequacy of the intersection design . . . " (R. 254, ¶B.d.). The Board cited as factors the steep grade of the existing street (7% to 10%) where hazardous icing conditions were known to develop as well as "blind spots" in the sight distance lines on both the proposed and existing roads (R. 252-54, ¶B.a-b), relying upon Section 81M of the SCL as expressed in the requirement of its regulations, Section IV.A.1.a, that all streets in a subdivision "be designed so that, in the opinion of the Board, they will provide safe vehicular travel." (R. 140).

Only after issuance of the June 1988 grant of subdivision plan approval did the court, on August 24, 1988, on a motion by Petitioner solely challenging the condition as to intersection safety documentation (T.T. 201-03), strike as in excess of the Board's authority the requirement that Petitioner provide such documentation. (R. 258, 261).

B. Procedural History

On December 20, 1988, Petitioner filed this civil rights action pursuant to 42 U.S.C. § 1983 seeking damages for a one and a half year delay (R. 45, ¶ 31) in approval of his revised plan from the date of the October 17, 1986 remand of his initial plan and claiming such delay to be a violation of his substantive due process rights.[7]

Respondents' motions for summary judgment and directed verdicts were denied and the jury returned verdicts against the Town and Planning Board members, Foreman and Greenough, individually, in the amounts of $375,000.00, $50.00 and $50.00,

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7. A claim under the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, § 11I, is not a subject of the Petition.

respectively. (R. 76-81). Attorney's fees, interest and costs in the amounts of $120,000.00, $190,875.00, and $3,333.75, respectively, were granted by the Court. (R. 116-18). Respondents' motions for judgment notwithstanding the verdicts were denied (R. 110-15) and the Respondents timely appealed to the Massachusetts Appeals Court. (R. 125). The Massachusetts Supreme Judicial Court transferred the case *sua sponte* and reversed the judgments of the Superior Court on all counts. 419 Mass. 548 (1995) (Petitioner's App. A-1 - A-21).

REASONS FOR DENYING THE WRIT

I.

THE SUPREME JUDICIAL COURT CORRECTLY REVERSED JUDGMENTS FOR THE PETITIONER WHERE PETITIONER BASED HIS CLAIMS, BOTH AT TRIAL AND ON APPEAL, UPON THE SUBSTANTIVE DUE PROCESS STANDARD ARTICULATED BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

A. Petitioner Is Precluded from Arguing the Application of a Standard Different from the Standard He Relied Upon at Trial and Before the Supreme Judicial Court.

The Supreme Judicial Court noted that neither party objected to jury instructions framed on the basis of *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992),[8] which, therefore became the law of the case. (Petitioner's App. A-12 - A-13, *citing Barry v. Stop & Shop Cos.*, 24 Mass. App. Ct. 224, 230 (1987)).

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8. Indeed, Petitioner's counsel stated to the trial court "Your Honor, . . . if you set the standard [as] in the *PFZ* case, . . . I'll agree to that." (App., *infra*, 7a).

Under the federal and state rules of civil procedure, a party has an affirmative obligation to object to a jury instruction it considers erroneous prior to the jury retiring to consider its verdict. Fed. R. Civ. P. 51; Mass. R. Civ. P. 51(b).[9] Both federal and state courts have applied Rule 51 to preclude a party from raising on appeal an issue that was encompassed in the jury charge and to which the appellant failed to object in a timely manner. *E.g., Springfield v. Kibbe*, 480 U.S. 257, 259 (1987); *Solimene v. B. Grauel & Co., KG*, 399 Mass. 790, 804 (1987); *Benjamin v. Felton & Son, Inc.*, 9 Mass. App. Ct. 926, 927-28 (1980); *see also Flood v. Southland Corp.*, 416 Mass. 62, 66-67 (1993). Petitioner is, therefore, unable to raise this issue at this late stage, where he *agreed* to a jury instruction derived solely from First Circuit precedent (App., *infra*, 7a) and failed to raise the argument on appeal to the Supreme Judicial Court. Brief of Plaintiff-Appellee, *Freeman v. Town of West Boylston, et al.*, 419 Mass. 548 (1995) (No. SJC-06645).[10]

This case is substantially similar to that presented to this Court in *Springfield v. Kibbe*, 480 U.S. 257 (1986), *cert. dismissed as improvidently granted*. There the Court, in granting certiorari, anticipated that it would be able to reach the question

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9. Massachusetts Rule of Civil Procedure 51(b) is substantially similar to the cognate federal rule, providing that:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections.

10. Notably, Petitioner fails in this regard to include in his Statement of the Case any indication of the point(s) in the proceedings below where he raised the issue he now attempts to argue before this Court, as required by Rule 14.1(h) of this Court's Rules, thus failing to demonstrate that the question "was timely and properly raised so as to give this Court jurisdiction. . . ."

whether a "heightened negligence" standard was sufficient to establish liability of a municipality under 42 U.S.C. § 1983 for inadequate training of its employees, consistent with the Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). *Kibbe*, 480 U.S. at 258. While the Petitioner argued that such a standard was insufficient under *Monell's* requirement of a municipal policy, this Court concluded, after full briefing and oral argument, that it could *not* reach the merits of the case where petitioner did not object to the jury instruction on heightened negligence and failed to argue for a higher standard than gross negligence in the Court of Appeals.

The Court stated, "[w]e ordinarily will not decide questions not raised or litigated in the lower courts. That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction" due to the restrictions of Rule 51. *Id.* at 259. Massachusetts courts have similarly applied Mass. R. Civ. P. 51(b). *See Bank of Boston v. Haufler*, 20 Mass. App. Ct. 668, 671 n.7 (1985) and the decision below. (Petitioner's App. A-13 n. 13).

For the reasons stated by this Court in *Kibbe*, Petitioner's failure to object to the jury instructions on substantive due process which were based upon First Circuit decisions, indeed his agreement that the trial court apply the same (App., *infra*, 7a), and his failure to argue for a different standard in the Supreme Judicial Court should preclude him from raising the argument before this Court. The writ of certiorari, therefore, should be denied.

B. There Has Been No Departure from Decisions of the First Circuit.

Although the Supreme Judicial Court of Massachusetts applied "the law as it has been articulated by the First Circuit"

(Petitioner's App. A-13 n.13), quoting extensively from First Circuit decisions (*Id.* A-13 - A-17), Petitioner at 3, 8-9, on the basis of such quoted verbiage, asserts the creation of a new standard by the state court because of the court's use of the phrase "truly horrendous," a phrase taken from the First Circuit's decision in *Nestor Colon Medina & Sucesores, Inc. v. Custodio,* 964 F.2d 32, 45 (1st Cir. 1992).

The "conflict" thus posited by Petitioner as a basis for review poses at most a verbal tension in the language of the decision below. Nowhere in the Supreme Judicial Court decision, however, is the quoted language employed to annunciate a "new standard" of review. Moreover, nothing in the record suggests that this case would be decided differently by the First Circuit or any of the other federal courts of appeals. *See* discussion, *infra,* part II.

Petitioner, at 9 n.9, asserts that the First Circuit's use of the term "horrendous" in *Nestor Colon* did not suggest that "horrendous" conduct was interchangeable with "egregious misconduct" or that conduct need be horrendous to comport with that standard. The distinction, regardless of its validity, is meaningless in this case. No First Circuit decision has been cited which suggests that the conduct here in question, as a matter of law, rose even to the level of "egregious misconduct." The Supreme Judicial Court's analysis clearly reveals that it did not suggest or impose a higher threshold than the First Circuit. Rather, the Supreme Judicial Court canvassed the First Circuit's decisions to determine whether, viewing the evidence in the light most favorable to Petitioner, there was sufficient basis to demonstrate the "requisite arbitrariness and caprice" to constitute a violation of the Petitioner's Federal Constitutional rights and applied that standard to Respondents' actions. (Petitioner's App. A-13, *quoting Amsden v. Moran,* 904 F.2d 748, 754 n.5 (1st Cir. 1990), *cert. denied,* 498 U.S. 1041 (1991)).

Indeed, First Circuit decisions consistently agree with the Supreme Judicial Court's findings that where, as here:

1) there has been no deprivation of procedural protection (Petitioner's App. A-11); and

2) "state courts are available to correct error" (Petitioner's App. A-14, *citing PFZ Properties. Inc. v. Rodriguez,* 928 F.2d 28, 32 (1st Cir. 1991), *cert. dismissed as improvidently granted,* 503 U.S. 257 (1994) (*quoting Chiplin Enters., Inc. v. City of Lebanon,* 712 F.2d 1524, 1528 (1st Cir. 1983)),[11];

3) where, viewing the record in the light most favorable to Petitioner, no deliberate flouting of a court order can be found (Petitioner's App. A-15, A-16, contrasting the record with that in *Roy v. Augusta,* 712 F.2d 1517 (1st Cir. 1983)); and

4) the record discloses "no evidence of personal animus, that other developers were treated more favorably than the [Petitioner], or that board members stood to profit personally from their actions" but rather, that the board members "were motivated by doubts about the safety of the intersection, a legitimate area of concern for a local planning board," (Petitioner's App. A-17)[12],

the "requisite arbitrariness and caprice", *Amsden,* 904 F.2d at 754

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11. *See also Parratt v. Taylor,* 451 U.S. 527 (1981); *Paul v. Davis,* 424 U.S. 693 (1976).

12. *Contrast Cordeco Dev. Corp. v. Vasquez,* 539 F.2d 256, 260 (1st Cir.) (recognizing a constitutional violation by local officials singling out a permit applicant for adverse treatment due to "illegitimate 'political' or, at least personal motives"), *cert. denied,* 429 U.S. 978 (1976).

n.5, has not been reached, leaving no issue of fact for the jury. (Petitioner's App. A-15 n.15).

As such, no basis exists for reviewing the decision as a departure from the decisions of the First Circuit.

II.

THERE IS NO CONFLICT BETWEEN THE STANDARD APPLIED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT TO THE PETITIONER'S SUBSTANTIVE DUE PROCESS CLAIM AND THE STANDARD APPLIED BY THE FIRST CIRCUIT COURT OF APPEALS AND OTHER FEDERAL COURTS TO COMPARABLE CLAIMS.

Petitioner, posing a second verbal conflict, asserts, at 3, that the First Circuit "expressly rejects the arbitrary and capricious test" to evaluate substantive due process claims, despite reference in First Circuit cases to the "requisite arbitrariness and caprice," *Amsden v. Moran*, 904 F.2d 748, 754 n.5 (1st Cir. 1990), *cert. denied*, 498 U.S. 104 (1991), and reliance upon such articulated standard by the Supreme Judicial Court in reaching its decision. (Petitioner's App. A-13). *See* discussion, *supra*, Part I.B.

The First Circuit, itself, noting a range of linguistic variation among the decisions, has "declined the invitation to sort out so wide a variety of labels," and has chosen to put "[w]ordplay" aside. *Amsden*, 904 F.2d at 754. Instead, the First Circuit, in harmony with other circuits, has, in the absence of fundamental procedural irregularity, invidious discrimination, or infringement on a fundamental interest, *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), focused upon whether the challenged action is "sufficiently keyed to any

legitimate state interests." *PFZ Properties. Inc. v. Rodriguez,* 928 F.2d 28, 31-32 (1st Cir. 1991), *cert. dismissed as improvidently granted,* 503 U.S. 257 (1994). In so doing, the First Circuit and other circuit courts echo this Court's approach to substantive due process challenges in the land use arena as stated in *Euclid v. Ambler Co.,* 272 U.S. 365, 395 (1926), and *Nectow v. City of Cambridge,* 277 U.S. 183, 187 (1928) ("a court should not set aside the determination of public officers in such a matter unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."). *See, e.g.,* decisions cited in Petitioner's survey at 10-12: *RRI Realty Corp. v. Village of Southampton,* 870 F.2d 911, 915 (2d Cir.) (*citing* "the deferential standards of *Euclid*"), *cert. denied,* 493 U.S. 893 (1989); *DeBlasio v. Zoning Bd. of Adjustment for the Township of W. Amwell,* 53 F.3d 592, 600 (3d Cir. 1995) (focusing on "partisan political or personal reasons unrelated to the merits of the application" or "any legitimate governmental objective"); *Blanche Road Corp. v. Bensalem Township,* Nos. 94-1344 & 94-1362, slip op. at 23-25 (3d Cir. May 26, 1995) (actions not rationally related to a legitimate government interest or deliberate interference with the process for reasons unrelated to the merits of the application); *Scott v. Greenville County,* 716 F.2d 1409, 1420 (4th Cir. 1983) (focusing on "singling out a permit applicant for adverse treatment due to illegitimate 'political' or, at least, personal motives," *citing Cordeco Dev. Corp. v. Vasquez,* 539 F.2d 256, 260 (1st Cir.), *cert. denied,* 429 U.S. 978 (1976)); *Shelton v. City of College Station,* 780 F.2d 475, 479-80, 483 (5th Cir.) (*Euclid/Nectow* "legitimate government interest" standard), *cert. denied,* 477 U.S. 905; 479 U.S. 822 (1986); *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1224 (6th Cir. 1992) (denial of rezoning or variances did not violate substantive due process rights where concerns about traffic are rationally related to goals of zoning, a legitimate government

interest); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 466-67 (7th Cir. 1988) (First Circuit's determination in *Creative Environments* read as consistent with *Euclid's* "legitimate government interest" formulation); *Chesterfield Dev. Corp. v. City of Chesterfield,* 963 F.2d 1102, 1104 (8th Cir. 1992) agreeing with First Circuit's statement in *Creative Environments,* 680 F.2d at 833, that "the conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution"); *Dodd v. Hood River City,* No. 93-35207, slip op. at 7639 (9th Cir. June 29, 1995) (*Euclid* "legitimate government interest" standard); *Jacobs, Visconi & Jacobs v. City of Lawrence,* 927 F.2d 1111, 1119-20 (10th Cir. 1991) (*Euclid* standard applied to find denial of rezoning application on grounds that suburban mall would defeat goal of protecting vitality of downtown business district a determination related to a legitimate government purpose); *Edie v. Sarasota County,* 908 F.2d 716, 721 (11th Cir. 1990) (*Nectow* "legitimate government interest" standard), *cert. denied,* 498 U.S. 1120 (1991); *Silverman v. Barry,* 845 F.2d 1072, 1087 (D.C. Cir.) ("Whatever the confusion and delay, the District was in pursuit of a legitimate government interest"), *cert. denied,* 488 U.S. 956 (1988).

Applying the *Euclid/Nectow* touchstone of "legitimate government interest", the Fifth Circuit observed that, "[t]his standard, though not always fully elaborated, has in practice been uniformly followed in zoning cases." *Shelton,* 780 F.2d at 483. Similarly, the Seventh Circuit, reading the First Circuit's decision in *Creative Environments* as synonymous with *Euclid's* deferential "legitimate government interest" standard, declared, "No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." *Coniston Corp.,* 844 F.2d at 466.

Even those decisions cited by Petitioner as evincing most concern with linguistic tensions between court of appeals decisions recognize a universal deference among federal circuit courts to local boards and officers when reviewing local administrative land use actions. *Pearson,* 961 F.2d at 1222; *Littlefield v. City of Afton,* 785 F.2d 596, 607 (8th Cir. 1986). The Sixth Circuit, in *Pearson,* for instance, concluded that the "shocks the conscience" terminology, employed in decisions of the Sixth and First Circuits as well as this Court, *see Rochin v. California,* 342 U.S. 165, 172 (1952),

> is useful in the zoning context ... to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority — and to understand the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law.

Pearson, 961 F.2d at 1222.

Indeed, even the Eighth Circuit, which once characterized the First Circuit as out of step, has today embraced the First Circuit's terminology, joining other circuits which, in practice, were always in harmony with the First Circuit. *See* cases cited in *Littlefield,* 785 F.2d at 605-07.[13]

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13. Perhaps the only irreconcilable example cited by *Littlefield,* 785 F.2d at 60, was *Shelton v. City of College Station,* 754 F.2d at 1256-57, *overturned en banc,* 780 F.2d 475 (5th Cir.) *cert. denied,* 477 U.S. 905 (1986) shortly after publication of the *Littlefield* decision. *Littlefield,* itself, has fallen into disrepute as subsequent decisions of the Eighth Circuit have moved into harmony with First Circuit terminology. *See Chesterfield Dev. Corp.,* 963 F.2d at 1104-05; *Lemke v. Cass County, Nebraska,* 846 F.2d 469, 470-71 (8th Cir. 1987).

In short, Petitioner has offered nothing to suggest that this case would be decided differently by the federal court of appeals of any circuit. Employing the analysis common to all circuits, the Supreme Judicial Court found that there was no "deliberate flouting of the law," "no evidence of personal animus, that other developers were treated more favorably than the [Petitioner], or that board members stood to profit personally from their actions." (Petitioner's App. A-17). The Board's members "were motivated by doubts about the safety of the intersection, a legitimate area of concern for local planning boards. *See* G.L. c. 41, § 81M." *Id.*

> A local planning board, whose functions are in many respects discretionary and which involve the interpretation and application of highly technical laws and regulations, should be allowed to address matters within its realm of responsibility without exposure to liability under the Act every time its actions are overturned.

(Petitioner's App. A-20) (addressing arguments under the Massachusetts Civil Rights Act, modeled after 42 U.S.C. § 1983).

It has often been observed and repeated that the role of federal courts "is not and should not be to sit as a zoning board of appeals." *Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). Since the present case presents no more than the garden variety land use dispute eschewed by all circuits as outside the realm of substantive due process, no conflict between state or federal standards is demonstrated and the Petition should be denied.

III.

THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD TO RESOLVE REAL OR PERCEIVED VARIATIONS IN THE CIRCUIT COURTS' ARTICULATION OF THE STANDARD FOR SUBSTANTIVE DUE PROCESS CLAIMS WHERE, TO AVOID A MANIFESTLY UNJUST RESULT TO THE RESPONDENTS, REVERSAL OF THE STANDARD APPLIED WOULD NECESSITATE EXAMINATION OF PROCEDURAL ISSUES BY WHICH THE SUPREME JUDICIAL COURT DECLINED TO ADDRESS THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST PREREQUISITE TO A SUCCESSFUL SUBSTANTIVE DUE PROCESS CLAIM.

When the Supreme Judicial Court, on the basis of the parties' reliance on cases from the First Circuit in forming their requests for jury instructions and other contentions to the judge,[14] canvassed the trial record in search of a sufficient basis to support Petitioner's substantive due process claim, it assumed but did not hold that the Petitioner had a property right in approval of the plan. (Petitioner's App. A-13, n.14). The court noted Respondents' position that Petitioner had no legitimate entitlement — and hence no constitutionally protected property interest — in subdivision plan approval, during the period encompassed by his claim, under the elaborate state framework for exercise of planning board discretion (*see* Petitioner's App. A-20), but stated:

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14. Indeed, the Petitioner relied exclusively on the First Circuit's articulations of the threshold applied to substantive due process claims in its arguments to the Supreme Judicial Court as well. *See* discussion, *supra*, Part I.A.

> [w]e do not consider whether this contention is correct, because, *in its present, highly detailed guise*, it does not resemble any argument made to the judge below. . . . Thus, we agree with the plaintiff's contention that the defendants' motions for directed verdict and for judgment notwithstanding the verdict failed to preserve this issue, *in this form*, for appeal.

(Petitioner's App. A-13 - A-14, n.14) (emphasis added).[15]

The Respondents did indeed challenge, at every juncture, the sufficiency of Petitioner's evidence to establish a constitutionally protected property right,[16] arguing as early as on motion for

15. The issue, however, may still be raised in this Court in support of the judgment below. *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970). An appellee need not appeal or cross-appeal in order to "urge in support of a decree any matter appearing in the record, although his argument may invoke an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). "The prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge*, 397 U.S. at 475-76 n.6 (1970). The principal is sometimes called the Langnes doctrine, based upon *Langnes v. Green*, 282 U.S. 531 (1931), which discusses the subject at length. To protect the Respondents' rights, however, a conditional cross-petition has been filed on this point. *See* Cross-Petitioners/Respondents' Conditional Cross-Petition for Writ of Certiorari, *Freeman v. Town of West Boylston, et al.*, (United States Supreme Court) (No. 95-145) [hereinater "Cross-Petitioners/Respondents' Conditional Cross-Petition"]; *see generally*, Stern, Gressman, Shapiro and Geller, Supreme Court Practice 368 (7th Ed. 1993); R. Stern, *When to Cross-Appeal or Cross-Petition — Certainty or Confusion*? 87 Harv. L. Rev. 763, 773-74 (1974).

16. The crux of the property right analysis, as has been presented by Respondents, is that Petitioner's burden was to demonstrate during the (Cont'd)

summary judgment that Petitioner was unable to meet his burden of establishing a "legitimate entitlement" to subdivision plan approval pursuant to Mass. Gen. L. ch. 41, § 81K, *et seq.* as an essential element of his case. (Supp. R. 8-9, 25-26). The argument

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(Cont'd)
relevant period a legitimate claim of entitlement to subdivision plan approval "grounded in state law." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). No such entitlement was created or recognized by the superior court judge's remand to the planning board because, under black letter Massachusetts law, planning board disapproval is valid where any single valid basis for disapproval has been identified and the reviewing authority therefore has no authority to annul it. *Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 179 (1977); *Loring Hills Developers Trust v. Planning Bd. of Salem*, 374 Mass. 343, 352 (1978). In this instance, the Superior Court upheld the disapproval on two valid grounds — drainage and the absence of Board of Health review — and could not substitute its discretion for that of the board even had it found no supportable basis for disapproval. *Strand v. Planning Bd. of Sudbury*, 5 Mass. App. Ct. 18, 22-24 (1977). Once planning board disapproval of a plan has been upheld, an applicant who wishes to proceed must reapply to the board in a manner that meets all the requirements of the SCL and complies with all regulations in effect on the date of application (in this instance, amendments to the Board's rules and regulations imposing greater sight distance requirements) (R. 153-64; 173-78). He must also obtain board of health approval of the new plan, and submit to a public hearing designed to afford abutters an opportunity to participate and, if need be, appeal, the new plan. *Strand*, 5 Mass. App. Ct. at 23; *Poulos v. Planning Bd. of Braintree*, 413 Mass. 359, 359-60 (1992); *Patelle v. Planning Bd. of Woburn*, 6 Mass. App. Ct. 951, 952 (1978); *Doeblin v. Dinkham Dev. Corp.*, 7 Mass. App. Ct. 720, 721 (1979); Mass. Gen. L. ch. 41, § 81T. (*See* Petitioner's App. A-39). As the Petitioner did not take these steps, and, in fact, delayed plan approval by refusing to submit to the required public hearing (Petitioner's App. A-40), he had no legitimate claim of entitlement to subdivision plan approval, and thus no property right in approval of his plan, during the period about which he complains. In addition, since Petitioner sought a waiver of a through street requirement of the Board's rules and regulations, he had no entitlement to plan approval unless and until the Board exercised its discretion to grant such waiver. Mass. Gen. L. ch. 41, § 81R; *Mac-Rich*, 4 Mass. App. Ct. at 85. (Petitioner's App. A-16).

was developed through trial examination (T.T. 237-38)[17], set forth by motion for directed verdict (App., *infra*, 11a-19a), and at length during arguments on motions for directed verdict (T.T. 757, 775-78, 796-97, 800) and motions for judgment notwithstanding the verdict (Supp. R. 32, n.2), and, indeed acknowledged in the Superior Court's instructions to the jury. (App., *infra*, 8a-10a).

In their motion for directed verdict, Respondents stated, in pertinent part:

> [T]he plaintiff . . . has established *neither a property right* nor evidence of the type of oppressive abuse of power which could arguably implicate the due process clause. *The plaintiff has failed to establish a property right* sufficiently definite to trigger the due process clause *since he had no right to an approval of his plan until* the drainage aspect was approved *after the second public hearing* in May, 1988. Prior to that time, the drainage plan he submitted did not *comply with the Board's regulations* and he had no right to subdivide his property *until* he satisfied the Board on that issue and *after a public hearing was held as required by law and until the abutter's appeal was disposed of.*

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17. At trial Petitioner's prior attorney admitted that "[t]he law *did* require a public hearing . . . prior to final approval of the plan," that abutters had an absolute right to appeal from such a hearing, and that the judge had ruled that the law required a public hearing prior to subdivision plan approval (T.T. 237-39) (emphasis added). By this testimony, Petitioner's former counsel also admitted that the advice of the Board's counsel that there was no need for a public hearing, the very advice Petitioner seeks, at 6, to chastise Respondents for "flagrantly disregarding," was erroneous.

(App., *infra*, 12a) (emphasis added).

Petitioner's burden to establish a property interest in subdivision plan approval is so integral to the analysis of his substantive due process claim that it infuses other aspects of substantive due process analysis as well in the decision below, despite assertions to the contrary. (Petitioner's App. A-14). For example, in focusing upon the rationality of the planning board's action, the Supreme Judicial Court acknowledged a degree of discretion antithetical to an entitlement by Petitioner:

> [N]owhere in [the judge's written decision on plan disapproval] was it suggested that the board had forfeited the right to insist on compliance with the through street requirement. * * * Moreover, . . . town counsel . . . indicated that the topic [of intersection design] remained open for discussion. . . . The board's consulting engineer forcefully contended . . . that the board retained the authority to insist on improvements to the intersection. * * * [A]s late as March, 1988, the judge agreed with the board's position to the extent of ordering a new public hearing, and declined to instruct the board that it must confine itself to considering the drainage issue.
>
> *Most importantly * * * the board . . . did not attempt to deny the [Petitioner] the approval to which at some point, he was entitled, and did not cause him the loss of his property.*

(Petitioner's App. A-15 - A-16) (emphasis added).

To reach the property right issue directly entails an excursion across the state procedural law landscape to determine whether an essential element of Petitioner's federal claim can be decided against Respondents, not on the basis of an outright waiver of the property right issue or argument, but rather on the basis of lack of detail in its form or presentation. (Petitioner's App. A-14).[18] Should certiorari be granted, the interests of justice would certainly demand such an excursion, since a new articulation of the threshold for substantive due process claims without inquiry into the existence of a constitutionally protected property right could potentially result in the reimposition of substantial monetary damages upon a public entity and public officials who have effectuated no constitutional deprivation. *See* Respondents' Conditional Cross-Petition.

Even so, the case does not present an appropriate record to resolve real or perceived verbal tensions in the standard for substantive due process applied by federal courts where the true focus of the matter lies in the degree of entitlement to plan approval possessed by Petitioner under a comprehensive state subdivision law which bestows extensive discretion upon planning boards. (*See* Petitioner's App. A-20). Therefore, the writ should be denied.

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18. In Massachusetts, a party who moves for a directed verdict pursuant to Mass. R. Civ. P. 50(a) challenging the adequacy of the evidence presented — in this case the adequacy of Petitioner's proffered evidence of property right in subdivision–plan approval — and who then moves for judgment notwithstanding the verdict on the same grounds after the jury returns an adverse verdict, has adequately preserved the issue for appellate review. *See, e.g., International Fidelity Ins. Co. v. Wilson,* 387 Mass. 841, 846 (1983); *Tucker v. Badoian,* 376 Mass. 907, 916 (1978); *Connors v. New England Telephone & Telegraph Co.,* 22 Mass. App. Ct. 243, 244 (1986); *see also, Brighetti v. Consolidated Rail Corp.,* 20 Mass. App. Ct. 192, 196 n.4 (1985) (no waiver of issue for appeal when particular issue is subject of motion for directed verdict and judgment notwithstanding the verdict; no objection to jury instruction(s) is necessary).

IV.

THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD TO RESOLVE REAL OR PERCEIVED VARIATIONS IN THE CIRCUIT COURTS' ARTICULATION OF THE STANDARD FOR SUBSTANTIVE DUE PROCESS CLAIMS WHERE QUALIFIED IMMUNITY AND THE ABSENCE OF AN IMPERMISSIBLE PATTERN, PRACTICE OR POLICY PROVIDE INDEPENDENT GROUNDS TO SUSTAIN THE JUDGMENT BELOW.

A. Foreman and Greenough Are Shielded by Qualified Immunity.

Because the Supreme Judicial Court determined that no deprivation of Petitioner's alleged property right in violation of substantive due process occurred, it did not reach Respondents' additional argument that the individually-named defendants, Charles Greenough and Kathleen Foreman, were entitled to qualified immunity. (Petitioner's App. A-21). As a matter of law, however, the individuals in question are immune from liability under 42 U.S.C. § 1983.

"[G]overnment officials performing discretionary functions generally are shielded from liability [under 42 U.S.C. § 1983] for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known.*" *Harlow v. Fitzgerald,* 437 U.S. 800, 817-18 (1982) (emphasis added). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

The applicable standard being an objective one, the question of whether the right claimed to be protected by the constitution or

by statute is "clearly established" is one of law for the court, not the jury. *Siegert v. Gilley*, __ U.S. __, 111 S. Ct. 1789, 1793 (1991) (determination of existence of clearly established right at time of defendant's conduct is a "purely legal" threshold immunity question).

In this case, the trial court erred as a matter of law in submitting the issue of qualified immunity to the jury (T.T. 977, 985-89) as well as failing to grant Respondents Foreman and Greenough's motions for directed verdict and for judgment notwithstanding the verdict on the basis of qualified immunity. Despite Petitioner's repeated efforts to characterize the Respondents' authority under the SCL as lacking discretion, the Respondents' actions in subdivision plan review are highly discretionary in nature, as noted by the Supreme Judicial Court. (Petitioner's App. A-20).

More importantly "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984). Charges that substantive due process has been denied carry with them a burden by which a plaintiff must show a due process deprivation of *constitutional* dimension. *See Davis*, 468 U.S. at 194. A defense of qualified immunity need not go even that far; Respondents may insure safe passage on such defense merely by showing that, given the state of the law in 1986, reasonable officials would not have known that the actions in question amounted to a deprivation of a plaintiff's *constitutional* rights. *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991).

Whether the Planning Board correctly applied the SCL is strictly a matter of Massachusetts law. *See Amsden*, 904 F.2d at 757. Both Foreman and Greenough testified that the Board was

confused by the remand order (T.T. 436, 430, 734) and believed there were additional discretionary decisions open to the Board under the judge's order (T.T. 481). They were advised by counsel that the interim order was still subject to challenge (T.T. 502; R. 275-76) and were confirmed in those views by the judge herself, who ultimately clarified or reversed her earlier position on the need for and scope of a public hearing on the revised plan in her March 18, 1988 order. (Petitioner's App. A-39 - A-40). As such, the interim judgment of October 17, 1986 was not clear, established, legally correct or even final as a matter of state law and hardly a vehicle by which reasonable officials would have had even an inkling that the actions in question amounted to a deprivation of Petitioner's *constitutional* rights.

The Respondents Foreman and Greenough's motions for directed verdict and judgment notwithstanding the verdict should have been granted by the trial court and the Supreme Judicial Court's Judgment below is independently sustainable on the basis of qualified immunity.

B. No Pattern, Practice or Policy Implicates the Town.

In order to establish a claim against the Town under 42 U.S.C. § 1983, the Petitioner must allege and prove that the Town maintains an official policy, custom, or usage which, when implemented, acts as a causal link to deprive a person of a constitutionally protected right. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 691 (1978). Since there is no trial evidence whatsoever as to any pattern, practice or policy of impermissible delays or deprivations by the Board or any condonation of the same by the Town, *City of St. Louis v. Praprotnik*, 45 U.S. 112 (1988), as to the Petitioner or others and since ample statutory avenues of redress in any case exist under State law, Mass. Gen. L. ch. 41, § 81BB, no deprivation, causal link or pattern has been demonstrated. The Respondent Town's motions for directed verdict and judgment notwithstanding the

verdict should have been granted by the trial court and the Supreme Judicial Court's Judgment below is independently sustainable on this basis as well.

This matter is, therefore, not an appropriate vehicle to reach any real or perceived tensions in the standard for substantive due process articulated by federal courts of appeals and the writ should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOYCE FRANK
Counsel of Record
ELIZABETH A. LANE
MICHELE E. RANDAZZO
KOPELMAN AND PAIGE, P.C.
Attorneys for Respondents
101 Arch Street
Boston, Massachusetts 02110
(617) 951-0007

APPENDIX A — EXCERPTS OF RELEVANT PROVISIONS OF THE MASSACHUSETTS SUBDIVISION CONTROL LAW

Mass. Gen. L. ch. 41, § 81M (1994) provides, in pertinent part:

> The subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions . . . . The powers of a planning board . . . under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions. . . . It is

> the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land; provided, however, that such board may, when appropriate, waive, as provided for in section eighty-one R, such portions of the rules and regulations as is deemed advisable.

Mass. Gen. L. ch. 41, § 81O (1994) provides, in pertinent part:

> No person shall make a subdivision of any land in any city or town in which the subdivision control law is in effect unless he has first submitted to the planning board of such city or town for its approval a plan of such proposed subdivision, showing the lots into which such land is to be divided and the ways already existing or which are to be provided by him for furnishing access to such lots, and the planning board has approved such plan in the manner hereinafter provided.

Mass. Gen. L. ch. 41, § 81Q (1994) provides, in pertinent part:

> After a public hearing . . . a planning board shall adopt, and . . . may, from time to time, amend, reasonable rules and regulations relative to subdivision control not inconsistent with the subdivision control law or with any other

> provisions of a statute or of any valid ordinance or by-law of the city or town.

Mass. Gen. L. ch. 41, § 81R (1994) provides, in pertinent part:

> A planning board may in any particular case, where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, waive strict compliance with its rules and regulations . . . .

Mass. Gen. L. ch. 41, § 81T (1994) provides, in pertinent part:

> Before approval, modification and approval, or disapproval of the definitive [subdivision] plan is given, a public hearing shall be held by the planning board, notice of the time and place of which and of the subject matter, sufficient for identification, shall be given by the planning board at the expense of the applicant by advertisement in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication being not less than fourteen days before the day of such hearing or if there is no such newspaper in such city or town then by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing, and by mailing a copy of such advertisement to the applicant and to all owners of land abutting upon the land included in such plan as appearing on the most recent tax list.

Appendix A

Mass. Gen. L. ch. 41, § 81U (1994) provides, in pertinent part:

> When a definitive plan of a subdivision is submitted to the planning board, as provided in section eighty-one O, a copy thereof shall also be filed with the board of health or board or officer having like powers and duties. Such health board or officer shall, within forty-five days after the plan is so filed, report to the planning board in writing, approval or disapproval of said plan, and, in the event of disapproval, shall make specific findings as to which, if any, areas shown on such plan cannot be used for building sites without injury to the public health, and include such specific findings and the reasons therefor in such report, and where possible, shall make recommendations for the adjustments thereof. Failure of such board or officer to report shall be deemed approval by such board or officer. Such health board or officer shall send a copy of such report, if any, to the person who submitted said plan.
>
> * * *
>
> After the hearing required by section eighty-one T and after the report of said health board or officer or lapse of forty-five days without such report, the planning board shall approve, or, if such plan does not comply with the subdivision control law or the rules and regulations of the planning board or the recommendations of the health board or officer, shall modify and approve or shall disapprove such plan. In the event of disapproval,

> the planning board shall state in detail wherein the plan does not conform to the rules and regulations of the planning board or the recommendations of the health board or officer and shall revoke its disapproval and approve a plan which, as amended conforms to such rules and regulations or recommendations. The planning board shall file a certificate of its action with the city or town clerk, a copy of which shall be recorded by him in a book kept for the purpose, and shall send notice of such action by registered mail, postage prepaid, to the applicant at his address stated on the application.

Mass. Gen. L. ch. 41, § 81W (1994) provides, in pertinent part:

> A planning board, on its own motion or on the petition of any person interested, shall have power to modify, amend or rescind its approval of a plan of a subdivision, or to require a change in a plan as a condition of its retaining the status of an approved plan. All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the approval of the modification, amendment or rescission of such approval and to a plan which has been changed under this section.

Mass. Gen. L. ch. 41, § 81BB (1994) provides, in pertinent part:

> Any person, whether or not previously a party

to the proceedings, or any municipal officer or board, aggrieved by a decision of a board of appeals under section eighty-one Y, or by any decision of a planning board concerning a plan of a subdivision of land, or by the failure of such a board to take final action concerning such a plan within the required time, may appeal to the superior court for the county in which said land is situated or to the land court pursuant to the provisions of clause (k) of section one of chapter one hundred and eighty-five; provided, that such appeal is entered within twenty days after such decision has been recorded in the office of the city or town clerk or within twenty days after the expiration of the required time as aforesaid, as the case may be, and notice of such appeal is given to such city or town clerk so as to be received within such twenty days. The court shall hear all pertinent evidence and determine the facts, and upon the facts so determined, shall annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, but the parties shall have all rights of appeal and exceptions as in other equity cases.

* * *

All issues in any proceeding under this section may be advanced for speedy trial over other civil actions and proceedings.

APPENDIX B — EXCERPTS FROM THE TRIAL TRANSCRIPT [HEREINAFTER "T.T."]

(Portion of Charge Conference T.T. 833-34)

[833] deprivation of due process.

Now, obviously, I'm going to hopefully say it in a little more articulate and flowing style than I've just given it to you, but basically that's where it's coming from.

Stopping for the moment, if I can put my hands on it, I notice that you, Mr. O'Connor, have asked me to, in your Number 26 and 27, you've asked me to deal with whether the defendants acted intentionally or recklessly or merely negligently and you've asked for specific instructions in 31 and 32 of what is meant by intentional and reckless and what is meant by negligent.

None of the cases that dealt with this issue of alleged administrative body misconduct that I recall got into this at all, other than those cases in which there is some suggestion of personal animus or racial difficulties or something of that sort, none of which, I suggest, that I've heard any evidence on in this case in terms of personal motivation to injure this plaintiff.

I'd like your comments on that. I have to say the cases, and I've looked at countless cases [834] at this point, and the PFZ case seems to be the latest pronouncement of the First Circuit on this issue, so have you any comments on that? Do you object to this, or how do you feel about it?

MR. O'CONNOR: Your Honor, I think that if you set the standard in the PFZ case, then I think that's probably — I'll agree to that.

Appendix B

THE COURT: All right, thank you.

I will have — within thirty minutes of the time the jury goes out there's a going to be a question coming back, indeed if I don't get it before they leave the box, saying, "What on earth does that mean," and at that point in time I'm going to get you two gentlemen together and I'm going to say, okay, now what do I tell them, because I haven't the faintest idea how to articulate it any more clearly than — or I should say, using the word "clearly" in quotes, than our Courts have done up till now, and frankly I would be very hesitant to try, because they seem to be unsettled in just how they put it.

I saw one other case, and it was the case that finally satisfied me that there wasn't any way I was going to be able to say it any better,

* * *

(Portion of Jury Instructions T.T. 970-72)

[970] merely, and I keep saying merely, arbitrary in doing or undertaking the duties of a Planning Board enough. Neither is mere bad faith alone necessarily tantamount or equal to a violation of the plaintiff's due process rights.

Not every violation by a government body of someone's property rights rises to the level of a violation of due process. It must be of such a nature as I mentioned to you a moment ago. Namely, it's government power being used for purposes of oppression, abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate interest of the Town of West Boylston.

Appendix B

Now, you may ask yourself, well, what is a property right in the context that I am now using it? Bear with me just for a moment.

The plaintiff's claim for a property right here is basically on his assertion that he has a right to have a subdivision plan approved if it conforms to the rules and regulations of the Planning Board and recommendations of the Board of Health.

[971] The statute on this, the Massachusetts statute which governs the actions of a Planning Board, requires that any subdivision plan filed with the Planning Board shall receive the approval of such Board if the plan conforms to the recommendations of the Board of Health and to the reasonable rules and regulations of the Planning Board pertaining to subdivisions of land. Before, however, such approval is required, there are certain procedural steps that must be followed, including, without trying to spell them all out, but notice to the Town Clerk, for example. A public hearing must be held which is advertised in the local paper for two weeks, and there are certain notices posted in the Town Hall of the public hearing, and a mailing of notice regarding that public hearing to the applicant and the abutters, so that it just doesn't happen automatically, you send the plan in and the Planning Board looks at it and says, yeah, that conforms, bang, out it goes. It doesn't work that way. You have to go through these procedures, as well, but if you do, that section of the statute cuts in and tells us that if it does, in fact, conform to the recommendations of the Board of [972] Health, and there was evidence in this case regarding that, and to the reasonable rules and regulations of the Planning Board, then the Planning Board must approve it.

A Planning Board does not have the freedom to disapprove a

plan which complies with the rules and regulations of the Board merely because the Board feels disapproval would be in the public interest.

Now, you've also heard testimony about the Court Order issued here, and I want to say something with respect to that, as well.

When a Massachusetts Superior Court Judge issues an Order requiring a person or a Board or any other entity to take certain action or to refrain from taking certain action, I instruct you that the person or entity to whom that Order is directed is required by law to comply with the Court's Order.

However, I should also add, as I mentioned to you a moment ago, failure to comply with that Order, of itself alone, is not a violation of the plaintiff's due process rights, unless it comes to and adds up to that standard that I gave you a few moments ago, namely, it is the use of governmental

* * *

APPENDIX C—EXCERPTS FROM THE RECORD BELOW:

Respondents Foreman and Greenough's
Motion for Directed Verdict Filed September 8, 1992

COMMONWEALTH OF MASSACHUSETTS
Worcester, ss

Superior Court
Department of the Trial
Court of the Commonwealth
Civil Action
No. 88-3632

ELIOT R. FREEMAN,

Plaintiff

vs.

TOWN OF WEST BOYLSTON, PLANNING BOARD OF THE TOWN OF WEST BOYLSTON, KATHLEEN FOREMAN, GEORGE [SIC] GREENOUGH, WILLIAM FORREST AND LINWOOD PERRY, Individually and as they are MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON AND VICTOR CUSANELLO AS HE IS A MEMBER OF THE PLANNING BOARD,

Defendants

Appendix C

MOTION FOR DIRECTED VERDICT OF DEFENDANT [SIC] KATHLEEN FOREMAN AND CHARLES GREENOUGH AS THEY ARE MEMBERS OF THE WEST BOYLSTON PLANNING BOARD

The plaintiff has filed an action seeking damages against Charles Greenough and Kathleen Foreman individually. There is insufficient evidence from which a jury could conclude that Mr. Greenough or Mrs. Foreman engaged in conduct which deprived the plaintiff of his constitutional right to substantive or procedural due process. Procedural due process is satisfied in land use dispute as long as the state provides a system for a hearing for review by the Court for correction of errors at the Board level. See *Rosenfeld v Board of Health of Chilmark*, 27 Mass App Ct 621 (1989). Furthermore, the plaintiff has failed to present sufficient evidence to warrant a jury in finding a substantive due process violation because he has established neither a property right nor evidence of the type of oppressive abuse of power which could arguably implicate the due process clause. The plaintiff has failed to establish a property right sufficiently definite to trigger the due process clause since he had no right to an approval of his plan until the drainage aspect was approved after the second public hearing in May, 1988. Prior to that time, the drainage plan he submitted did not comply with the Board's regulations and he had no right to subdivide his property until he satisfied the Board on that issue and after a public hearing was held as required by law and until the abutter's appeal was disposed of. Also any language on the June 24, 1988 decision as to supplying data as to the safety of the intersection even if erroneously inserted in the decision, was no harm to Mr. Freeman since he could not develop his property until the abutter's appeal was resolved. Mass. G.L.c. 41, §81V.

Secondly, there is insufficient evidence of a substantive due process violation even if it is assumed that the plaintiff had a property right to approval at some point in the process. The plaintiff has not established evidence of abuse of governmental power for purposes of oppression or abuse of power which shocks the conscience or action that is legally irrational without it is not sufficiently keyed to any legitimate state interest. *PFZ Properties v Rodriguez*, 923 F2d 28 (lst Cir. 1991). See *Miga v Hoyoke*, 398 Mass 343 (1986). There is no evidence of improper financial or personal motive for Board action. *Id.* See also *Bello v Walker*, 840 F2d 1124 (3d Cir. 1988). Nor has the plaintiff been deprived of anything to which the due process clause could respond since mere fluctuations in value during the process of governmental decision making is not compensable absent extraordinary circumstances. *Wilson v Commonwealth*, 31 Mass App Ct 757 (1992) aff'd 413 Mass 352 (1992). Accordingly, the plaintiff has failed to establish enough to warrant submission of the 1983 claim to the jury.

Thirdly, there is no evidence that Greenough and Foreman engaged in conduct which interfered with the plaintiff's civil rights by threat, coercion or intimidation and therefore the plaintiff cannot recover under Count II. *Rodriguez v Furtado*, 410 Mass 878 (1991).

Fourthly, Greenough and Foreman, if not entitled to absolute immunity, is entitled to qualified immunity from damages for discretionary acts undertaken in his role as a member of the Planning Board. *Harlow v Fitzgerald*, 457 U.S. 800 (1982); *Rodriguez v Furtado*, 410 Mass 878 (1991). The plaintiff cannot overcome such immunity because the plaintiff cannot and did not introduce evidence that defendants Greenough and Foreman did anything to which violated Freeman's "clearly established"

constitutional rights. Freeman cannot show that he had any clearly established constitutional due process right which was violated by defendants Greenough and Foreman. Rather cases such as *Chaplin Enterprises v City of Lebanon*, 712 F2d 1526 (1st Cir 1983); *Chongris v Board of Appeals of Andover*, 811 F2d 36 (1st Cir. 1987), clearly establish that Freeman's due process rights were not violated at all as there is a state procedure to review and remedy error of law made by local land use agencies. Therefore, the plaintiff cannot recover for these reasons as well as the reasons set forth in the joint motion for directed verdict submitted on behalf of all defendants.

By his attorney,

s/ John F. Hurley, Jr.
John F. Hurley, Jr., Esquire
MacCarthy Pojani & Hurley
446 Main Street
Worcester, MA 01608
(508) 798-2480
BBO #245200

Dated: 9/18/92

Appendix C

Respondent Town of West Boylston's Motion for Directed Verdict, Filed September 8, 1992

COMMONWEALTH OF MASSACHUSETTS
Worcester, ss

Superior Court
Department of the Trial
Court of the Commonwealth
Civil Action
No. 88-3632

ELIOT R. FREEMAN,

Plaintiff

vs.

TOWN OF WEST BOYLSTON, PLANNING BOARD OF THE TOWN OF WEST BOYLSTON, KATHLEEN FOREMAN, GEORGE [SIC] GREENOUGH, GEORGE BERNARDIN, WILLIAM FORREST, BRUCE J. PENNINO AND LINWOOD PERRY, Individually and as they are MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON and MICHAEL RAFFERTY in his capacity as CONSULTING ENGINEERING [SIC] FOR THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON,

Defendants

Appendix C

MOTION OF DEFENDANT WEST BOYLSTON PLANNING BOARD AND TOWN OF WEST BOYLSTON FOR DIRECTED VERDICT

The defendant Town of West Boylston moves for directed verdict as to both counts and states the following grounds.

1. The plaintiff has failed to present evidence from which a trier of fact would be warranted in finding that the plaintiff's constitutional right to due process was denied by any party to this case. See *Alton Land Trust v Alton*, 745 F2d 730 (1st Cir 1984).

2. The plaintiff has failed to present evidence that the defendant Town of West Boylston engaged in any conduct from which a trier of fact would be warranted in concluding that the plaintiff's civil rights were interfered with by threats, coercion or intimidation under Mass G.L.c. 12, §11I.

3. Even if the plaintiff presented sufficient evidence to warrant a finding that the plaintiff's rights to procedural due process were violated, there is no *respondent superior* liability against the town under 42 USC §1983 from which a jury would be warranted in concluding that any such violation of constitutional rights was caused by a policy of custom of the town adopted by government officials authorized to make such policy. See *St. Louis v Propotnik*, 485 U.S. 112 (1988). Further there is no evidence of a general policy which works an unconstitutional deprivation of due process in its implementation by the town. *Id.*

4. Even if the plaintiff presented sufficient evidence from which a jury could conclude that an individual defendant or

defendants interferred with the plaintiff's civil rights by threats, intimidation or coercion, there was insufficient evidence to warrant a finding that the town was responsible for actions of the individuals who were found to have interfered with the plaintiff's civil rights by intimidations or coercion. *Cf Breault v Chairman of the Board of Fire Comm'rs of Springfield*, 401 Mass 26 (1987) at n.1 (Summary Judgment granted as to City of Springfield and denied as to individuals who may have violated statute). The Supreme Judicial Court has not yet ruled that the doctrine of *respondent superior* applies to make a municipality liility tr isolated acts of town elected officials. See *Rodriquez v Furtado*, 410 Mass 878, 889 n. (1991) (Mass has not decided if the *Monell* standard requiring the existence of government policy which coercec etc., applies under G.L.c. 12, §11H, I. In the absence oi holding by the Court that respondent suerior applies to claim against governmental entities under G.L.c. 12, §11I, the Town is entitled to a directed verdict in the absence of evidence that action of the town such as a town meeting vote, constituted coercion or intimidation or that an official town policy or custom interfered with Freeman's civil rights by coercion or intimidation. *Id.* If the Court concludes that respondent superior applies to Section 11I claim, then the town is entitled to the same qualified immunity that applies to immunizes public officers for their discretionary actions. See *Duarte v Healy*, 405 Mass. 43 tl989); *Rodriguez v Furtado*, 410 Mass 878 (1991) (Qualified immunity for officials making discretionary decisions).

5. The action against the West Boylston Planning Board and its members in their official capacity is essentially an action

action against the Town and the Court must direct a verdict in favor of the West Boylston Planning Board for the reasons set forth above.

By his attorney,

s/ John F. Hurley, Jr.
John F. Hurley, Jr., Esquire
MacCarthy Pojani & Hurley
446 Main Street
Worcester, MA 01608
(508) 798-2480
BBO #245200

frvbo.mot

Appendix C

Supplemental Motion for Directed Verdict
Filed September 18, 1992

COMMONWEALTH OF MASSACHUSETTS
Worcester, ss

Superior Court
Department of the Trial
Court of the Commonwealth
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vs.

TOWN OF WEST BOYLSTON, PLANNING BOARD OF THE TOWN OF WEST BOYLSTON, KATHLEEN FOREMAN, GEORGE [SIC] GREENOUGH, WILLIAM FORREST AND LINWOOD PERRY, Individually and as they are MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON AND VICTOR CUSANELLO AS HE IS A MEMBER OF THE PLANNING BOARD

Defendants

SUPPLEMENTAL MOTION FOR DIRECTED VERDICT OF DEFENDANTS GREENOUGH, FOREMAN, PERRY AND FORREST

The individual defendants move for directed verdict as to both counts on the grounds that as a matter of law their conduct

was not an intentional violation of the plaintiff's civil rights and therefore these defendants are immune from liability under the State Civil Rights Act, See *Breault v Chairman of Bd of Fire Com'r,* 401 Mass 26 (1987) (Wilkins J., concurring) and also immune under the Civil Rights Act for the same reasons.

By their attorney,

s/ John F. Hurley, Jr.
John F. Hurley, Jr., Esquire
MacCarthy Pojani & Hurley
446 Main Street
Worcester, MA 01608
(508) 798-2480
BBO #245200

Dated: 9/18/92